DOCKET

No. 08-1008
Title: Shady Grove Orthopedic Associates, P.A., Petitioner
v.
Allstate Insurance Company
Docketed: February 11, 2009
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (07-0141)
Decision Date: November 19, 2008
Questions Presented

Date	Proceedings and Orders
Feb 6 2009	Petition for a writ of certiorari filed. (Response due March 13, 2009)
Feb 20 2009	Waiver of right of respondent Allstate Insurance Company to respond filed.
Mar 4 2009	DISTRIBUTED for Conference of March 20, 2009.
Mar 6 2009	Response Requested . (Due April 6, 2009)
Apr 3 2009	Brief of respondent Allstate Insurance Company in opposition filed.
Apr 14 2009	Reply of petitioner Shady Grove Orthopedic Associates, P.A. filed.
Apr 15 2009	DISTRIBUTED for Conference of May 1, 2009.
May 4 2009	Petition GRANTED.
May 28 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 10, 2009.
May 28 2009	The time within which to file respondent's brief on the merits is extended to and including August 28, 2009.
Jul 10 2009	Joint appendix filed. (Statement of costs filed)
Jul 10 2009	Brief of petitioner Shady Grove Orthopedic Associates, P.A. filed.
Jul 13 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner received.
Jul 14 2009	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Jul 17 2009	Brief amicus curiae of Public Justice filed.
Aug 17 2009	SET FOR ARGUMENT ON Monday, November 2, 2009.
Aug 20 2009	CIRCULATED.
Aug 28 2009	Brief of respondent Allstate Insurance Company filed. (Distributed)
Aug 31 2009	Record received from U.S.C.A. for the Second Circuit. (1 envelope)
Aug 31 2009	Record received from U.S.D.C. for the Eastern District of of New York (1 envelope)
Sep 4 2009	Brief amici curiae of Partnership for New York City, Inc., et al. filed. (Distributed)
Sep 28 2009	Reply of petitioner Shady Grove Orthopedic Associates, P.A. filed. (Distributed)
Nov 2 2009	Argued. For petitioner: Scott L. Nelson, Washington, D.C. For respondent: Christopher Landau, Washington, D.C.

Name	Address	Phone

Attorneys for Petitioner:

Scott L. Nelson
Counsel of Record
Public Citizen Litigation
1600 20th Street, N.W.
Washington, DC 20009
snelson@citizen.org
(202) 588-7724

Party name: Shady Grove Orthopedic Associates, P.A.

John S. Spadaro
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Party name: Shady Grove Orthopedic Associates, P.A.

Attorneys for Respondent:

Christopher Landau
Counsel of Record
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005-5793
clandau@kirkland.com
(202) 879-5000

Party name: Allstate Insurance Company

Andrew Thomas Hahn
Seyfarth Shaw LLP
620 Eight Avenue, 32nd Floor
New York, NY 10018
(212)-218-5554

Party name: Allstate Insurance Company

Other:

Douglas W. Dunham
Four Times Square
New York, NY 10036
(212) 735-3000

Party name: Partnership for New York City, Inc., et al.

Amanda Frost
4801 Massachusetts Ave. NW
Washington, DC 20016
(202) 274-4046

Party name: Public Justice

PETITION FOR WRIT OF CERTIORARI

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No. 08-

IN THE
Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road, Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorney for Petitioner

220906

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?

2. Can state legislatures dictate procedure in the federal courts?

3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Shady Grove Orthopedic Associates, P.A. has no corporate parent, and there is no publicly held company owning ten percent or more of its stock.

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Petitioner Shady Grove Orthopedic Associates, P.A. ("Shady Grove") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's December 15, 2006 memorandum opinion is published at 466 F. Supp.2d 467, and reproduced in the accompanying appendix at pages 19a-36a. The Second Circuit's November 19, 2008 opinion is published at 549 F.3d 137, and appears at pages 1a-18a of the appendix.

STATEMENT OF JURISDICTION

The opinion and judgment for which review is sought were issued by the Second Circuit on November 19, 2008. This petition is thus timely, having been filed within 90 days of the judgment below. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

In this proposed class action, Shady Grove's central allegation is that Allstate routinely violates section 5106(a) of the New York Insurance Law in its handling of no-fault automobile insurance claims; and that as a result, Allstate owes statutory interest to every member of the proposed class. Section 5106(a) provides:

> Fair claims settlement. (a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred.

> Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.

N.Y. Ins. Law § 5106(a).

The district court and Second Circuit both held that no class action could be maintained in the federal courts due to the prohibition on class actions in section 901(b) of New York's Civil Practice Law and Rules. Section 901(b) provides:

> b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

N.Y. CPLR § 901(b).

STATEMENT OF THE CASE

This proposed class action seeks compensatory damages and declaratory and other relief for Allstate's violations of N.Y. Ins. Law § 5106(a) and related breaches of contract. It was commenced by the filing of a class action complaint on behalf of the two original plaintiffs, Shady Grove and Sonia E. Galvez, in the U.S. District Court for the Eastern District of New York on April 20, 2006. Jurisdiction in the district court was based on the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2)(A).

A. The Thirty-Day Standard and Interest Penalty

Under New York Vehicle & Traffic Law § 319(1) (part of New York's Motor Vehicle Financial Security Act), persons who own any motor vehicle registered in New York or operate or permit to be operated a motor vehicle in New York must maintain specified forms of liability insurance. New York Insurance Law § 5103(a) provides that liability insurance issued in satisfaction of section 319's requirements must also provide for the payment of first-party benefits to specified categories of persons, and for loss arising out of the use or operation of the insured vehicle. These first-party benefits (sometimes referred to as "no-fault," "personal injury protection" or "PIP" benefits) include, by virtue of the definitions set forth in New York Insurance Law § 5102, payments to reimburse persons for medical and other expenses up to $50,000 per person.

Under New York Insurance Law § 5106(a), payment of first-party no-fault benefits pursuant to section 5103

must be made as the loss is incurred. Section 5106(a) further provides that such benefits are overdue if not paid within 30 days after the claimant supplies proof of the fact and amount of the loss. It provides, too, that overdue benefits bear interest at the rate of 2% per month.

Regulations promulgated by New York's Insurance Department likewise govern the processing of claims for first-party no-fault benefits. Under 11 NYCRR 65-3.5(a), an insurer may request verification of the claim for no-fault benefits within 10 business days of its receipt of the claimant's application for such benefits. If an insurer makes a timely request for verification under 11 NYCRR 65-3.5(a), the time within which the insurer must pay the claim for no-fault benefits is tolled pending the insurer's receipt of the requested verification. *King's Medical Supply Inc. v. Country-Wide Ins. Co.*, 783 N.Y.S.2d 448, 450 (N.Y. Civ. Ct. 2004). If the requested verification is not supplied to the insurer within 30 days of the original request, then 11 NYCRR 65-3.6(b) requires the insurer to communicate a follow-up request for verification within 10 days thereafter. The regulations further provide, under 11 NYCRR 65-3.5(b), that an insurer may request additional verification within fifteen business days of its receipt of one or more completed verification forms.

Under 11 NYCRR 65-3.8(a)(1), no-fault benefits are overdue if not paid within thirty days after the insurer receives verification of all relevant information requested pursuant to 11 NYCRR 65-3.5 (in cases where such a request is made). As noted above, overdue benefits are subject to the interest penalty specified in section 5106(a) and 11 NYCRR 65-3.9(a).

The effect of this regulatory scheme (established under New York Insurance Law §§ 5102, 5103 and 5106, in combination with the provisions of 11 NYCRR 65-3) is to require insurers to pay covered no-fault benefits within thirty days of the claimant's submission of proof of the fact and amount of loss, or (in cases where the insurer makes a timely request for verification) within thirty days of the insurer's receipt of all requested verification. This same regulatory scheme makes no-fault insurers liable for payment of an interest penalty on overdue benefits, calculated at the rate of 2% per month.

B. Proceedings in the District Court

On July 12, 2006 Allstate moved to dismiss the complaint in the district court. Allstate argued, among other points, that 1) the prohibition on class actions under section 901(b) of New York's Civil Practice Law and Rules ("CPLR") supersedes Federal Rule of Civil Procedure 23, so that this action cannot properly proceed as a class action in federal court; and 2) Shady Grove alone, and not Ms. Galvez, is the real party in interest.

On December 15, 2006, the district court granted Allstate's motion. In so doing, the district court found that Shady Grove's patient, Ms. Galvez, was not a real party in interest, so that Shady Grove alone was the proper plaintiff. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 466 F. Supp.2d 467, 473-74 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008) ("*Shady Grove* I"). That holding is not the subject of this petition, and Ms. Galvez is no longer a party to these proceedings.

But the district court's other main holding led to Shady Grove's appeal. Specifically, the district court held that the prohibition on class actions under N.Y. CPLR § 901(b) renders the class action device unavailable in federal court for Shady Grove's state law claims. *Shady Grove* I, 466 F. Supp.2d at 471-73. Based on this latter holding, the district court dismissed the case in its entirety.

C. Proceedings in the Second Circuit

On appeal to the Second Circuit, the district court's judgment was affirmed. The Second Circuit found that through CPLR § 901(b) the New York legislature had effectively prohibited the federal courts from employing the (purely procedural) class action device for a broad range of state law claims. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 142-46 (2d Cir. 2008) ("*Shady Grove* II"). This petition followed.

REASONS FOR GRANTING THE PETITION

By permitting New York's legislature to dictate procedure in the federal courts, the Second Circuit has effectively ceded federal authority to the states. This raises compelling federal questions: *Can state legislatures prohibit the federal courts from using the class action device for state law claims? Could state-law class actions eventually disappear altogether, as more and more state legislatures declare them off limits to the federal courts?*

These questions should be settled, and can only be finally settled, in this Court. Moreover, the Second

Circuit's approach to federalism — allowing as it does a state legislature to prohibit a federal court's use of a federal procedural device — conflicts with this Court's longstanding conception of the (respective) sovereignties of state and federal government.

The class action device is, after all, purely procedural. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980) (referring to "the procedural device of a Rule 23 class action"); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (referring to "the procedural device of Rule 23"). As a matter of basic federalism, no state legislature can dictate the use or nonuse of the class action device in any federal court.

Yet to say that the class action device is procedural is not to say that it is ***merely*** procedural, because class actions continue to serve important interests. But other procedural devices are important, too; and some are so deeply ingrained in federal practice, and so heavily relied upon by the machinery of justice, as to constitute procedural due process itself. The question should thus be asked: if state legislatures can proscribe the use of class actions for particular claims in federal court, why can they not also proscribe other procedural devices? Why not have California's lawmakers legislate a ban on deposition practice in contract cases for all district courts sitting in California? Why not allow the Illinois legislature to prohibit the use of document requests for tort claims filed in district courts there?

The answer, in a word, is federalism:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.

Saenz v. Roe, 526 U.S. 489, 504 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). But the Second Circuit's decision threatens a dramatic incursion on federal sovereignty: if state legislatures can prohibit both state ***and*** federal courts from entertaining class actions on state law claims, the class action device could all but disappear from America's civil litigation landscape. Indeed, if every state followed New York's lead for every state law claim, class actions would henceforth be limited to federal claims only — a result that on its face is wildly inconsistent with Congress's intent in making class actions available in diversity cases.

The Second Circuit focused its analysis on whether section 901(b) is in "conflict" with Federal Rule of Civil Procedure 23. *Shady Grove* II, 549 F.3d at 142-45. But conflict or no, the fact remains that state legislatures cannot properly dictate procedure in the federal courts. This means that a decree from a state legislature requiring federal judges to wear powdered wigs must fail as a matter of federalism, regardless of whether the Federal Rules contain any "non-powdered-wig" provision.

Can New York's legislature take steps to limit the use of class actions in the New York courts? Presumably it can; but it has no such power in the federal courts, where procedure is fixed by the federal sovereign. Because the Second Circuit's decision shifts this federal power to the states, and because that shift raises fundamental issues of federalism, the writ should be granted.

CONCLUSION

For the reasons stated above, Shady Grove respectfully requests that writ of certiorari be allowed.

Respectfully submitted,

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road, Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED NOVEMBER 19, 2008

UNITED STATES COURT OF APPEALS
SECOND IRCUIT

Docket No. 07-0141-cv.

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A., on behalf of itself and all others similarly situated,

Plaintiff-Appellant,

Sonia E. Galvez,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

Argued: Sept. 10, 2008.
Decided: Nov. 19, 2008.

Before: CABRANES, POOLER, KATZMANN, Circuit Judges.

Appendix A

Pooler, Circuit Judge:

In this appeal, we address whether Section 901(b) of the New York Civil Practice Law and Rules ("CPLR")—which prohibits a lawsuit seeking a statutory penalty from being brought as a class action—may be applied in a federal court sitting in diversity jurisdiction and adjudicating claims under New York law. Plaintiff-appellant Shady Grove Orthopedic Associates brought a class action for statutory interest penalties under Section 5106(a) of New York Insurance Law ("N.Y. Ins. Law") against defendant-appellee Allstate Insurance Company. In an opinion and order dated December 15, 2006, the district court (Nina Gershon, J.) granted Allstate's motion to dismiss on the ground that Shady Grove's claim is barred by CPLR 901(b). Shady Grove now appeals that ruling.

BACKGROUND

Shady Grove's complaint alleged that Allstate failed to pay statutory interest penalties on overdue payments of insurance benefits owed to plaintiffs under no-fault automobile insurance policies issued by Allstate.[1] Shady Grove did not seek recovery of the insurance benefits

1. Sonia E. Galvez was also originally named as a plaintiff in this suit. Galvez, the insured, assigned her rights under her insurance policy to Shady Grove, a medical practice, and was dismissed from the lawsuit for lack of standing. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F.Supp.2d 467, 473-74 (E.D.N.Y.2006). Plaintiffs do not appeal the district court's ruling as to Galvez's lack of standing.

themselves, which it concedes were eventually paid by Allstate. Rather, Shady Grove alleged that Allstate failed to make the payments of insurance benefits within the time frame prescribed by Section 5106(a) of N.Y. Ins. Law and Part 65-3 of Title 11 of the New York Compilation of Codes, Rules and Regulations, rendering the benefits overdue and thus incurring the statutory interest penalty of two percent per month.[2] Shady Grove further alleged that Allstate (1) routinely fails to pay covered claims for first-party no-fault benefits within the statutorily mandated 30-day time period; (2) routinely ignores its obligation to pay the statutory interest owed in such cases; and (3) routinely and falsely claims to have never received proof of the loss from the insured, so as to avoid triggering the statutory time limits.

Shady Grove invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(d)(2)(A), which

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2. Under New York State's Motor Vehicle No-Fault Insurance Law, automobile insurers are required to reimburse policyholders for certain basic no-fault benefits. N.Y. Ins. Law § 5102(a). Policyholders may assign their rights to no-fault benefits to health care providers, who, in turn, may submit claims directly to insurance companies and receive payment for the claims. Regulations promulgated by the Superintendent of Insurance of New York require the policyholder or health-care-provider assignee to submit a notice of claim to the insurer within 45 days of receiving medical treatment. N.Y. Comp.Codes R. & Regs. tit. 11, § 65-1.1(d). The insurance company generally has 30 days from receipt of the claim to make payment or deny the claim. *See* N.Y. Ins. Law § 5106(a); N.Y. Comp.Codes R. & Regs. tit. 11, § 65-3.8.

provides that "[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant. . . ." Allstate is an Illinois corporation; Shady Grove is a Maryland corporation. The relevant automobile insurance policy is governed by New York law. Shady Grove sought damages in excess of $5,000,000 on behalf of a putative class of all individuals to whom Allstate owes interest under N.Y. Ins. Law § 5106(a). *See Shady Grove Orthopedic Assocs., P.A.*, 466 F.Supp.2d at 469. Shady Grove acknowledged that its individual claim for approximately $500 in damages, which was based on interest on services rendered to Galvez, would fail to meet the monetary requirement for diversity jurisdiction. *Id.*

Allstate moved to dismiss based on CPLR 901(b), which provides:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Therefore, Allstate argued, Shady Grove could not bring its action for a statutory interest penalty under N.Y.

Ins. Law § 5106(a) as a class action, and the district court lacked diversity jurisdiction. Shady Grove argued that CPLR 901(b) is not applicable to class actions brought in federal court because it is a procedural rule in conflict with Rule 23 of the Federal Rules of Civil Procedure. In a careful and thorough opinion, Judge Gershon rejected this argument, reasoning that:

> Whereas this Court is bound by Rule 23 in this action, the strictures of § 901(b) do not contravene any federal rule. This situation does not warrant an invocation of the Supremacy Clause or a discussion of the overlapping scope of § 901 and Rule 23. It would be patently unfair to allow a plaintiff an attempt at recovery in federal court for a state law claim that would be barred in state court.

Shady Grove Orthopedic Assocs., P.A., 466 F.Supp.2d at 472 (quoting *Dornberger v. Metro. Life Ins. Co.*, 182 F.R.D. 72, 84 (S.D.N.Y.1998) (alteration marks omitted)).

The district court also rejected Shady Grove's argument that N.Y. Ins. Law § 5106(a) falls within the exception clause of CPLR 901(b), which allows class action suits where "a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action . . ." *Id.* at 472, 474-75.

Shady Grove now appeals the district court's decision. Shady Grove argues that (1) under the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), a federal court should not apply a state procedural rule that would limit the use of a procedural device—here, the class action—that is otherwise available under the Federal Rules of Civil Procedure, and (2) the district court erred in failing to find that the exception clause of CPLR 901(b) was triggered.[3]

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3. In its reply brief, Shady Grove also requests that a question be certified to the New York Court of Appeals: whether the interest provision of N.Y. Ins. Law § 5106(a) constitutes a "penalty" within the meaning of CPLR 901(b). Def. Reply Br. at 11-15. Allstate moved to strike this new argument. Allstate is correct that Shady Grove waived this argument by failing to raise it in the district court or in its initial brief on appeal. The case that is the occasion for Shady Grove's new argument, *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 831 N.Y.S.2d 760, 863 N.E.2d 1012 (2007), did not set forth any new principle of law justifying Shady Grove's belated assertion of this argument. Moreover, *Sperry* was issued on February 22, 2007, more than two months before Shady Grove's initial appeal brief was filed on May 7, 2007. Therefore, we grant Allstate's motion to strike points VI and VII from Shady Grove's reply brief. We note that prior to *Sperry*, several New York courts—including the New York Court of Appeals—have characterized the interest provision in Section 5106(a) as a "penalty." *See, e.g., Dermatossian v. N.Y. City Transit Auth.*, 67 N.Y.2d 219, 224, 501 N.Y.S.2d 784, 492 N.E.2d 1200 (1986) (stating that under Section 5106, "insurers are obliged to honor [the claim] promptly or suffer the *statutory penalties* ") (emphasis added); *Cardinell v. Allstate Ins. Co.*, 302 A.D.2d 772, 774, 754 N.Y.S.2d

(Cont'd)

Appendix A

DISCUSSION

"We review the denial of a motion to dismiss the complaint de novo, accepting the truth of each factual allegation it contains." *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 194 (2d Cir.2008).

I. *Erie* Doctrine

"Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); *accord Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 118 (2d Cir.2005). "[T]he Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." *In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir.2001) (quotation marks omitted).

The Supreme Court has observed that "[c]lassification of a law as 'substantive' or 'procedural' for Erie purposes is sometimes a challenging endeavor." *Gasperini*, 518 U.S. at 427, 116 S.Ct. 2211. However, if a state rule is not compatible with a Federal Rule of Civil

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(Cont'd)

777 (3d Dep't 2003) (referring to the monthly interest payment under Section 5106(a) as an "interest penalty" that was "designed to inflict an economic sanction or penalty on those insurers who do not comply").

Procedure, the "question is usually unproblematic." *Id.* at 427 n. 7, 116 S.Ct. 2211. The Federal Rule controls under the Supremacy Clause, so long as that Federal Rule "is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution. . . ." *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 469-74, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987)).

In analyzing whether a state rule conflicts with a Federal Rule of Civil Procedure, we must "determine whether, when fairly construed, the scope of [the Federal Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." *Burlington N. R.R. Co.*, 480 U.S. at 4-5, 107 S.Ct. 967 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 & n. 9, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980)). In *Walker*, the Court cautioned: "[t]his is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning." 446 U.S. at 750 n. 9, 100 S.Ct. 1978. Nonetheless, "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies." *Gasperini*, 518 U.S. at 427 n. 7, 116 S.Ct. 2211 (citing *Walker*, 446 U.S. at 750-752, 100 S.Ct. 1978 and *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310-312 (7th Cir.1995)).

If the state rule does not directly collide with the Federal Rule, the inquiry becomes whether the choice of rule would be "outcome affective"—in other words, "[w]ould 'application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court'?" *Gasperini,* 518 U.S. at 428, 116 S.Ct. 2211 (quoting *Hanna,* 380 U.S. at 468 n. 9, 85 S.Ct. 1136) (alterations in original).[4] Courts must analyze this question in light of the "twin aims" of *Erie. Id.* at 430, 116 S.Ct. 2211. "The rationale of [*Erie*] was, first, that federal courts should obtain results substantially similar to those reached by state courts considering the same cause of action, and, second, that federal courts should avoid application of federal law if that application would significantly encourage forum shopping by prospective out-of-state litigants." *Morse v. Elmira Country Club,* 752 F.2d 35, 37 (2d Cir.1984) (citing *Walker,* 446 U.S. at 747, 100 S.Ct. 1978; *Hanna,* 380 U.S. at 467, 85 S.Ct. 1136).

However, the test of whether application of a rule is outcome affective "was never intended to serve as a

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4. This "outcome affective" test has evolved from the "outcome determinative" test set forth in *Guaranty Trust Co. of N.Y. v. York,* in which the Court asked: "does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

talisman." *Hanna*, 380 U.S. at 466-67, 85 S.Ct. 1136 (quoting *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958)). Federal courts will not apply a state rule if it would threaten " '[a]n essential characteristic of [the federal court] system.' " *Gasperini*, 518 U.S. at 431, 116 S.Ct. 2211 (quoting *Byrd*, 356 U.S. at 537, 78 S.Ct. 893) (alterations in original).

A. Does CPLR 901(b) Conflict with Rule 23?

As an initial matter, we must determine whether there is a conflict between Rule 23 and CPLR 901(b). *See id.* at 427 n. 7, 116 S.Ct. 2211. Every district court to consider this question in any detail has concluded that there is no conflict.[5] We agree.

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5. *See Holster v. Gatco, Inc.*, 485 F.Supp.2d 179, 185 n. 3 (E.D.N.Y.2007) (applying CPLR 901(b) to claims for statutory penalties brought under the Telephone Consumer Protection Act (TCPA), a federal statute allowing an action "otherwise permitted by the laws or rules of court" of the forum state, there New York (quoting 47 U.S.C. § 227(b)(3))); *In re Auto. Refinishing Paint Antitrust Litig.*, 515 F.Supp.2d 544, 549-50 (E.D.Pa.2007) (applying CPLR 901(b) to claims for statutory penalties brought under New York's Consumer Protection Act); *Bonime v. Avaya, Inc.*, No. 06 Civ. 1630, 2006 WL 3751219, at *3 n. 2 (E.D.N.Y. Dec. 20, 2006) (applying CPLR 901(b) to claims for statutory penalties brought under the TCPA); *Leider v. Ralfe*, 387 F.Supp.2d 283, 289-90 (S.D.N.Y.2005) (applying CPLR 901(b) to claims for statutory penalties brought under the Donnelly Act, New York's antitrust statute); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 284-85 (D.Mass.2004) (same); (Cont'd)

Appendix A

Rule 23, fairly construed, is not sufficiently broad to cause a direct collision with CPLR 901(b). Rule 23 provides that a class action "may be maintained" if (1) certain prerequisites for class certification are met—namely, numerosity, commonality, typicality, and adequacy of representation—and (2) the action falls into one of three enumerated categories of actions for which class-based adjudication is the superior method of resolution. CPLR 901(*a*) is a parallel statute, also setting forth the requirements of numerosity, commonality, typicality, adequacy of representation, and that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." CPLR 901(*b*), however, prohibits class actions to recover a penalty or a minimum measure of recovery absent specific statutory authorization. There is no analogue to CPLR 901(b) in Rule 23.

Rule 23 does not control the issue of which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs. *See Wade v. Danek Med., Inc.*, 182 F.3d 281, 290 (4th Cir.1999) ("Rule 23 . . . merely establishes the procedures for pursuing a class action in the federal courts. . . ."). Thus, Rule 23 leaves room for the operation of CPLR 901(b), which is a substantive rule

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(Cont'd)

United States v. Dentsply Int'l, Inc., Nos. 99 Civ. A. 005, 99 Civ. A. 255, 99 Civ. A. 854, 2001 WL 624807, at * 16 (D.Del. Mar.30, 2001) (same); *Dornberger*, 182 F.R.D. at 84 (applying CPLR 901(b) to claims for statutory penalties brought under New York statute addressing the misrepresentations of insurers).

that eliminates statutory penalties under New York law as a remedy for class action plaintiffs.

CPLR 901(b) is analogous to a statute of limitations, which is substantive for Erie purposes. *See Walker,* 446 U.S. at 746, 750-52, 100 S.Ct. 1978 (describing the holding of *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949) that a state's "service of summons statute controlled because it was an integral part of the state statute of limitations, and under *York* that statute of limitations was part of the state-law cause of action."). In *Walker,* the Supreme Court held that state law, rather than Rule 3 of the Federal Rules of Civil Procedure, determines when a diversity action commences for the purposes of tolling the state statute of limitations. Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court." This rule could be interpreted to conflict with state rules that provide for other means of commencing an action. But, the Court observed that Rule 3 makes no reference to the tolling of state limitations, and accordingly found no "direct conflict." *Id.* at 752, 100 S.Ct. 1978. Similarly, Rule 23 does not make reference to whether any particular state statutory cause of action can be brought as a class action or otherwise evidence an intent to occupy the field on this question. *See S.A. Healy Co.,* 60 F.3d at 307, 310-12 (concluding that state provision for offers of settlement by plaintiffs is compatible with Federal Rule 68, which is limited to offers by defendants, and rejecting district court's finding that Rule 68 "occupies the field") (cited with approval in *Gasperini,* 518 U.S. at 428 n. 7, 116

S.Ct. 2211); *cf. Com/Tech Commc'n Techs., Inc. v. Wireless Data Sys., Inc.*, 163 F.3d 149, 150-51 (2d Cir.1998) (holding that Rule 13 of the Federal Rules of Civil Procedure, which allows a defendant in a civil action to raise "any claim against an opposing party" as a counterclaim, conflicts with CPLR 3213, which prohibits a defendant from bringing counterclaims that would not independently qualify for summary process).

The Supreme Court distinguished *Walker* from *Hanna*, in which the Court found that the "clash" between Rule 4(d)(1), which provided for waiver of service, and a state in-hand service requirement was "unavoidable." *Walker*, 446 U.S. at 749, 100 S.Ct. 1978 (citing *Hanna*, 380 U.S. at 470, 85 S.Ct. 1136); *cf. Burlington N. R.R. Co.*, 480 U.S. at 7-8, 107 S.Ct. 967 (finding Alabama state statute imposing a *mandatory* penalty on an appellant upon affirmation of a money judgment to be in conflict with Rule 38 of the Federal Rules of Appellate Procedure, which affords federal courts *discretion* to award damages to an appellee). Here, there is no unavoidable clash—indeed, there is no clash at all. Rule 23's procedural requirements for class actions can be applied along with the substantive requirement of CPLR 901(b).

Moreover, in the *Erie* context, a Federal Rule should be interpreted "with sensitivity to important state interests and regulatory policies." *Gasperini*, 518 U.S. at 427 n. 7, 116 S.Ct. 2211 (citing *Walker*, 446 U.S. at

750-752, 100 S.Ct. 1978). The New York Court of Appeals has recently described the state interests behind CPLR 901(b):

> It is evident that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status. This makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred.

Sperry, 8 N.Y.3d at 213, 831 N.Y.S.2d 760, 863 N.E.2d 1012. Thus, the purpose behind CPLR 901(b) is to offset the deterrent effect of statutory penalties by eliminating the class action device as a means of enforcement of those penalties. CPLR 901(b) should be interpreted as part of the statutory interest penalty scheme, because it serves the state interest of offsetting that penalty. Allowing plaintiff to pursue its claims in federal court as a class action would circumvent this state policy.

B. Does Application of CPLR 901(b) in Federal Court Serve the Twin Aims of *Erie*?

Concluding that Rule 23 does not conflict with CPLR 901(b), we must now analyze whether application of CPLR 901(b) in federal courts to prohibit the use of the class-action device to recover penalties created by state statute is consistent with the aims of *Erie*. We agree with the overwhelming majority of district courts that have concluded that CPLR 901(b) is a substantive law that must be applied in the federal forum, just as it is in state court.[6] Any other conclusion would contravene the

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6. *See, e.g., Giovanniello v. Carolina Wholesale Office Machine Co., Inc.*, No. 06 Civ. 10235, 2007 WL 2363614, at *2-3 (S.D.N.Y. Aug. 20, 2007) (applying CPLR 901(b) to claims for statutory penalties brought under TCPA); *In re Auto. Refinishing Paint Antitrust Litig.*, 515 F.Supp.2d at 549-50; *Holster*, 485 F.Supp.2d at 185; *Bonime*, 2006 WL 3751219, at *3; *Leider*, 387 F.Supp.2d at 291; *In re Relafen Antitrust Litig.*, 221 F.R.D. at 285-86; *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 88 (S.D.N.Y.2001) (applying CPLR 901(b) to claims for statutory penalties brought under New York Minimum Wage Act); *Dentsply Int'l, Inc.*, 2001 WL 624807, at *16; *Dornberger*, 182 F.R.D. at 84.

The contrary cases brought to our attention by Shady Grove are neither controlling nor relevant. *See Wesley v. John Mullins & Sons, Inc.*, 444 F.Supp. 117, 119-20 (E.D.N.Y.1978) (treating CPLR 901(b) as procedural, without analysis or express holding on the issue); *In re Oot*, 112 B.R. 497, 502 (Bankr.N.D.N.Y.1989) (applying Rule 23's numerosity requirement because CPLR 901 was "procedural in nature"); *In re Peters*, 90 B.R. 588, 594 (Bankr.N.D.N.Y.1988) (similar).

mandates of *Erie* by allowing "plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court." *Leider*, 387 F.Supp.2d at 291. A failure "to apply CPLR 901(b) would clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the 'substantial advantages' of class actions." *In re Relafen Antitrust Litig.*, 221 F.R.D. at 285; see also *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 & n. 9, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (discussing the potential advantages of class-action litigation for plaintiffs and their counsel, including increased attorneys' fees and decreased costs).

C. Does Application of CPLR 901(b) in Federal Court Threaten Any Essential Characteristic of the Federal Court System?

Shady Grove argues that application of New York's CPLR 901(b) in federal courts would raise fundamental concerns of federalism, allowing "state legislatures [to] dictate to the federal courts the use or nonuse of procedural mechanisms that are otherwise available under the Federal Rules. . . ." Def. Reply Br. at 4. To be sure, the *Erie* doctrine does not require a federal court to apply a state rule where it would pose a threat to " '[a]n essential characteristic of [the federal court] system.' " *Gasperini*, 518 U.S. at 431, 116 S.Ct. 2211 (quoting *Byrd*, 356 U.S. at 537, 78 S.Ct. 893) (alterations in original). But Shady Grove has made no argument that the availability of the class action device in all circumstances is an "essential characteristic" of the

federal court system, particularly where the very cause of action that Shady Grove seeks to assert is a creature of New York state statute.

II. CPLR 901(b)'s Exception Clause

Finally, we address Shady Grove's argument that its cause of action under N.Y. Ins. Law § 5106(a) falls within the exception clause of CPLR 901(b), which allows class actions for statutory penalties if specifically authorized by statute. Based on a plain reading of CPLR 901(b), we conclude that it does not. CPLR 901(b) provides that where a statute creates a penalty, the "*statute*" itself must "*specifically authorize* [ ] the recovery thereof in a class action." (emphases added). N.Y. Ins. Law § 5106(a) contains no such authorization.

Plaintiffs argue that an implementing regulation, Part 65-3.9(c) of Title 11 of the New York Compilation of Codes, Rules and Regulations, demonstrates that a class action is permissible here. That regulation provides:

> If any applicant is a member of a class in a class action brought for payment of benefits, but is not a named party, interest shall not accumulate on the disputed claim or element of claim until a class which includes such applicant is certified by court order, or such benefits are authorized in that action by Appellate Court decision, whichever is earlier.

N.Y. Comp.Codes R. & Regs. tit. 11, § 65-3.9(c). The district court correctly rejected this argument. *Shady Grove Orthopedic Assocs., P.A.*, 466 F.Supp.2d at 475. At most, this regulation contemplates the recovery of a penalty in a class action; it does not demonstrate that the statute "specifically authorizes" that recovery as required by CPLR 901(b). Even if, as Shady Grove argues, the plain meaning of the statute renders the *regulation* superfluous, the plain meaning of the *statute* controls. "The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660, 827 N.Y.S.2d 88, 860 N.E.2d 705 (2006).

CONCLUSION

The district court's decision is AFFIRMED. Allstate's motion to strike the new arguments raised in points VI and VII of Appellant's Reply is GRANTED. Each party shall bear its own costs.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 15, 2006

UNITED STATES DISTRICT COURT
E.D. New York.

No. 06 CV 1842(NG)(KAM).

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

Dec. 15, 2006.

OPINION AND ORDER

GERSHON, District Judge.

Plaintiffs Shady Grove Orthopedic Associates, P.A. ("Shady Grove") and Sonia E. Galvez bring this class action against defendant Allstate Insurance Company ("Allstate") for Allstate's alleged failure to pay statutory interest penalties owed to New York customers on

overdue no-fault benefits. Plaintiffs do not seek recovery of the benefits themselves, which they concede were eventually paid by Allstate, but rather seek payment of the statutory interest penalties allegedly withheld by Allstate in connection with the overdue payments. To that end, plaintiffs request declaratory judgment that Allstate's automobile insurance policies contain an implied representation that Allstate will address no-fault claims in a manner consistent with New York Insurance Law ("N.Y.Ins.Law") § 5106 and Part 65-3 of Title 11 of the New York Compilation of Codes, Rules and Regulations ("N.Y.C.R.R.") and assert claims against Allstate for breach of contract, bad faith breach of contract, and violation of N.Y. Ins. Law § 5106. On behalf of a putative class, plaintiffs seek damages in excess of $5,000,000 and assert diversity jurisdiction under 28 U.S.C. § 1332(d)(2)(A). Plaintiffs acknowledge that their individual claim, for approximately $500 in damages, fails to meet the monetary requirement for diversity jurisdiction. Allstate now moves to dismiss the claims asserted against it by plaintiffs Shady Grove and Galvez. For the reasons set forth below, the motion to dismiss is granted.

FACTS

The allegations in the Complaint, described below, are taken as true for the purposes of defendant's motion to dismiss.

Allstate is an Illinois corporation that engages in the business of insurance. As part of that business,

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Allstate regularly sells automobile insurance within the State of New York. Since at least April 2000, Allstate has been among the most prolific underwriters of automobile insurance, including no fault-coverage, in the State of New York. At all times relevant to this case, Allstate has derived substantial revenues and profits from the sale of such insurance products in New York.

Shady Grove is a Maryland corporation established for the practice of orthopedic medicine. On more than one occasion, Shady Grove's employees rendered medical care and physical therapy to plaintiff Sonia E. Galvez for injuries she sustained in an automobile accident that occurred on May 20, 2005. Ms. Galvez resides in Maryland, but is a named insured under an Allstate "New York Private Passenger Auto Insurance Policy" (the "Allstate policy") which was in effect at the time of the accident.

As part payment for treatment, Ms. Galvez assigned to Shady Grove certain of her rights with respect to first-party no-fault benefits under the Allstate policy. Specifically, Ms. Galvez signed two documents authorizing (i) Shady Grove to apply for benefits from Allstate, and (ii) Allstate to pay the benefits directly to Shady Grove. The first document, titled "Patient Authorization", contains the following language:

> I Sonia Galvez hereby authorize Shady Grove Orthopaedic Associates, P.A., to apply for benefits on my behalf for covered services rendered by Shady Grove Orthopaedic

> Associates, P.A. I request payment from _____ be made directly to Shady Grove Orthopaedic Associates, P.A.

(Compl., Ex. A.). The second document, an "authorization and assignment form", provides as follows:

> I also requested that the insurance company pay directly to Shady Grove Orthopaedic Associates, P.A., any PIP benefits due me on their bill for professional services rendered in connection with these injuries.

(*Id.*).

Pursuant to Ms. Galvez's authorization, Shady Grove tendered to Allstate claims for first-party no-fault benefits under N.Y. Ins. Law § 5106 and Part 65-3 of Title 11 of the N.Y.C.R.R., in connection with the injuries Ms. Galvez suffered as a result of the collision. Allstate failed to make payment of the benefits within the time frame prescribed by N.Y. Ins. Law § 5106(a) and Part 65-3 of Title 11 of the N.Y.C.R.R., rendering the benefits overdue and thus subject to a statutory interest penalty of two percent. To date, Allstate has failed to make payment—to either Shady Grove or Ms. Galvez—of the statutory interest that, according to plaintiffs, continues to accrue.

Plaintiffs Shady Grove and Sonia E. Galvez commenced this lawsuit on April 20, 2006, on behalf of

themselves and all others similarly situated. The proposed class, as defined in the complaint, includes all persons to whom Allstate owes interest under N.Y. Ins. Law § 5106 and Part 65-3 of Title 11 of the N.Y.C.R.R. with respect to claims for first-party no-fault benefits arising since April 20, 2000. Plaintiffs contend that Allstate routinely fails to pay covered claims for first-party no-fault benefits within the statutorily mandated time period and routinely ignores its obligation to pay the statutory interest owed in such cases. Additionally, plaintiffs allege that Allstate routinely and falsely claims to have never received the insured's proof of loss in the first instance, so as to avoid violation of the statutory time restrictions.

Pursuant to those allegations, plaintiffs seek declaratory judgment and bring claims for breach of contract, bad faith breach of contract, and violations of N.Y. Ins. Law § 5106.[1] In addition, plaintiffs request that this court enter an order certifying the plaintiff class and appointing Ms. Galvez and Shady Grove's counsel to represent that class, pursuant to Rule 23 of the Federal Rules of Civil Procedure. As a class, plaintiffs seek a declaration establishing the parties' rights, duties, status or other legal relations under the affected insurance contracts. Finally, plaintiffs seek compensatory damages in the form of interest owed to Shady Grove, Galvez and all others similarly situated.

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1. Plaintiffs initially brought an additional claim for violation of New York General Business Law § 349 but subsequently, by letter dated August 18, 2006, withdrew it.

Appendix B

DISCUSSION

I. Standard for a Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). In considering a motion to dismiss, the court must accept as true all factual allegations set forth in the pleading and draw all reasonable inferences in favor of the plaintiff. *Phelps v. Kapnolas*, 308 F.3d 180, 184 (2d Cir.2002).

II. New York Law

In this diversity action, state substantive law applies. Because plaintiffs, on behalf of a putative class, assert claims based on Allstate's alleged failure to comply with New York State's Motor Vehicle No-Fault Insurance Law, a brief description of relevant New York law is appropriate.

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A. New York's No-Fault Insurance Law

Under New York State's Motor Vehicle No-Fault Insurance Law[2] (the "no-fault statute"), automobile insurers are required to reimburse policyholders (or insureds), for certain "basic economic loss" (also known as "no-fault benefits"). *See* N.Y. Ins. Law § 5102(a)(1). Insureds can assign their right to payment for no-fault benefits to health care providers who, in turn, may submit claims directly to insurance companies and receive payment for the claims.

To effectuate the prompt and efficient resolution of claims under the no-fault statute, the New York State Superintendent of Insurance, in 1977, adopted regulations establishing time frames in which to submit forms and notices pertaining to such claims. *See generally Medical Soc'y v. Serio*, 100 N.Y.2d 854, 768 N.Y.S.2d 423, 800 N.E.2d 728 (2003). In their current form,[3] the regulations require that the insured, or her assigned provider, submit proof of loss arising from medical treatment within 45 days from the date of treatment. *See* N.Y.C.R.R. tit. 11 § 65-1.1(d). The insurance company, in turn, has 30 days from receipt of the claim to (i) pay the policyholder (or the medical provider if the claim was assigned) or (ii) deny the claim.

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2. Codified at N.Y. Ins. Law §§ 5101 *et seq.*

3. Significant revisions were made to the regulations in 2002, resulting in a reduction in the time frames applicable to the filing of notices and proofs of claims.

See N.Y. Ins. Law § 5106(a); N.Y.C.R.R. tit. 11 § 65-3. Payments made by the insurance company after the 30-day period are deemed "overdue" and subject to a penalty of two percent interest calculated monthly. *See* N.Y. Ins. Law § 5106(a); N.Y.C.R.R. tit. 11 §§ 65-3.8(a)(1), 65-3.9(a). The 30-day period can be extended under certain circumstances if the insurer timely requests verification of the medical services for which reimbursement is sought. *See* N.Y.C.R.R. tit. 11 § 65-3.5. In that situation, payment must be made within 30 days after the information is supplied to the insurer. *See* N.Y. Ins. Law § 5106(a). In sum, the no-fault statute was enacted to provide prompt payments of uncontested medical bills.

B. New York's Limitation on Class Actions

Section 901(b) of the New York Civil Practice Law and Rules ("C.P.L.R.") bars the use of the class action mechanism to collect a statutory penalty unless class relief is specifically authorized in the underlying statute. Specifically, § 901(b) provides:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Id. This subdivision was "designed to discourage massive class actions for statutory violations where it

would be difficult to identify the members of the class and where recovery of the statutory minimum by each member results in a 'annihilatory punishment.' " C.P.L.R. § 901, cmt. C901:11 (McKinney 2005).

Although certification in class actions brought under diversity jurisdiction is governed by the requirements set forth under Rule 23 of the Federal Rules of Civil Procedure, the right to bring a class action in New York, in both federal and state court, is subject to the limitation imposed by § 901(b) of the C.P.L.R. *See, e.g., Leider v. Ralfe,* 387 F.Supp.2d. 283 (S.D.N.Y.2005); *Ansoumana v. Gristede's Operating Corp.,* 201 F.R.D. 81, 95 (S.D.N.Y.2001); *Dornberger v. Metropolitan Life Ins. Co.,* 182 F.R.D. 72, 84 (S.D.N.Y.1998). As Judge Leonard Sand stated in *Dornberger:*

> Whereas this Court is bound by [Rule 23] in this action, the strictures of [§ 901(b)] do not contravene any federal rule. This situation does not warrant an invocation of the Supremacy Clause or a discussion of the overlapping scope of [§ 901] and Rule 23. It would be patently unfair to allow a plaintiff an attempt at recovery in federal court for a state law claim that would be barred in state court.

182 F.R.D. at 84.

Plaintiffs, not surprisingly, argue that § 901(b) is procedural and therefore not applicable to class actions

brought in federal court under diversity jurisdiction. As support for their position, plaintiffs cite three cases, two of which, *In re Oot*, 112 B.R. 497 (Bankr.N.D.N.Y.1989), and *In re Peters*, 90 B.R. 588 (Bankr.N.D.N.Y.1988), fail even to address the issue at hand. Both cases relate only to the procedural requirements of § 901(a) of the C.P.L.R., the New York state analogue to Rule 23. While both *Peters* and *Oot* held that Rule 23, rather than § 901(a), governs the prerequisites to class certification in diversity cases brought in federal court, neither addressed § 901(b)'s limitation on recovering penalties via the class action mechanism. Accordingly, those cases provide no support for plaintiffs' position.

The final case on which plaintiffs rely is *Wesley v. John Mullins & Sons, Inc.*, 444 F.Supp. 117 (E.D.N.Y.1978). There, the court contemplated whether it should assert pendent jurisdiction over a claim based on state law which provided for recovery far in excess of the amount permitted by a parallel federal statute. The disparity in potential recovery arose because the state statute provided for recovery of statutory penalties which were considerably greater than those permitted by the federal statute. Because the class was seeking penalties, the court noted, § 901(b) prohibited the class action from being brought in state court. Rather than allowing this "anomaly" to continue in the federal forum, the court declined to exercise pendent jurisdiction over the state claim and decertified the class. In a footnote at the conclusion of its analysis, however, the court recognized that it "might have power to exercise pendent jurisdiction over the state class claims if the

amount of recovery sought thereunder were limited to that permissible under [the federal statute]." *Id.* at 120 n. 12. Such a result, the court continued, would among other things "circumvent the prohibition against class actions under C.P.L.R. § 901(b)." *Id.* From this dictum, which appears not to have arisen from any briefing of the issue, plaintiffs infer that § 901(b) is procedural and thus nonapplicable to federal adjudication of diversity actions. In the face of several recent federal decisions explicitly and persuasively holding that § 901(b) applies to diversity actions in federal court, I decline to adopt plaintiffs' argument.

III. Standing

Before analyzing plaintiffs' claims in light of controlling New York state law, it is necessary to address whether Shady Grove or Galvez has standing to bring the instant action. Indeed, only one of the two named plaintiffs is entitled to collect the statutory interest to which both make claim in the complaint. Accordingly, only one of them has standing to seek recovery in this court.

Under New York law, a medical provider who is the assignee of no-fault benefits is the real party in interest. *See, e.g., Craniofacial Pain Mgt. v. New York Cent. Mut. Fire Ins. Co.*, 186 Misc.2d 309, 310, 718 N.Y.S.2d 130 (2000) (holding that language assigning no-fault rights equal to the full amount of a bill for services rendered "evinces an intent to transfer all rights and interests for no-fault benefits by the assignor to the provider").

Appendix B

Where a provider has received a complete assignment, it alone is entitled to receive the statutory interest on associated overdue benefits. *See, e.g., Star Med. Servs., P.C. v. Allstate Ins. Co.*, 11 Misc.3d 128(A), 815 N.Y.S.2d 496 (N.Y.App. Term 2006).

After receiving treatment for her injuries, Galvez assigned her rights to apply for and receive payment of benefits from Allstate to Shady Grove. Indeed, her signature on both the "Patient Authorization" and the "Authorization and Assignment" forms (referenced above) evidence that Galvez assigned to Shady Grove the right to receive full payment for "services rendered by Shady Grove" directly from Allstate. While these documents do not specifically address whether Shady Grove is entitled to interest on overdue benefits, the language contained in the forms "evinces an intent to transfer all rights and interests for no-fault benefits" by Galvez to Shady Grove. *See Craniofacial Pain Mgt.*, 186 Misc.2d at 310, 718 N.Y.S.2d 130. Accordingly, Shady Grove is alone entitled to seek recovery of the statutory interest.

Common sense supports this result, as Shady Grove was the only party that suffered the out-of-pocket expenses associated with the late payments. Galvez, on the other hand, bore no such expense and received treatment in exchange for her complete assignment to her medical provider. Shady Grove provided Galvez treatment with the expectation that it would be reimbursed for its services in a timely manner. Allstate's alleged failure to do so, then, frustrated the expectations of Shady Grove, not Galvez.

Finally, the plain language of both § 5106(a) and the implementing regulations confirms that medical providers, as assignees, may recover the statutory penalty interest on overdue no-fault claims. Section 5106(a), for example, permits the "claimant," as opposed to the "insured" or "policyholder," to recover the interest. Furthermore, the regulations governing interest on overdue payments requires that such interest be paid to "the applicant or the applicant's assignee without demand therefore." N.Y.C.R.R. tit. 11 § 65-3.9(a). This provision, by its express terms, contemplates that, upon assignment, interest will be paid to the assignee.

Because Galvez made a complete assignment of her rights and interests in her no-fault benefits to Shady Grove, she no longer retains an interest in them. Accordingly, Galvez, as assignor, lacks standing to bring the instant action. Shady Grove, on the other hand, is the real party in interest in regard to the no-fault benefits at issue and therefore has standing to bring suit.

IV. Plaintiffs' Claims

Although plaintiffs bring four separate claims in this action, the gravamen of their allegations is that Allstate failed to pay statutory interest on overdue no-fault benefits as required by § 5106(a) of the N.Y. Ins. Law.

Appendix B

A. Violations of Section 5106(a)

Plaintiffs allege, on behalf of a putative class, that Allstate routinely violated N.Y. Ins. Law § 5106(a) by withholding statutory interest on overdue no-fault claims. As previously noted, however, § 901(b) of the C.P.L.R. disallows maintenance of a class action when the statute under which the action is being brought imposes a penalty. The two percent monthly interest imposed by § 5106(a), and sought by the plaintiffs, is such a penalty, established by the legislature to be assessed against those insurers who do not expeditiously settle a claim under the no-fault statute. *See Cardinell v. Allstate Ins. Co.*, 302 A.D.2d 772, 774, 754 N.Y.S.2d 777 (3d Dep't 2003). As the court in *Cardinell* observed, "the objective of the [5106] statute and regulation is to assure prompt and full payment of economic claims, and the designated interest rate is designed to inflict an economic sanction or penalty on those insurers who do not comply." *Id.* (internal citations omitted). The court continued, "[s]aid differently, the statute and regulation are punitive, with severe penalties, to encourage prompt adjustments of claims." *Id.* (internal quotation marks omitted). Because § 5106(a) imposes a two percent interest penalty, § 901(b) of the C.P.L.R. bars plaintiffs from seeking recovery of it in a class action.

Plaintiffs' argument that the exception in § 901(b)'s "unless clause" applies is rejected. Under a plain reading of § 901(b), where a statute creates a penalty, the statute itself must "specifically authorize[ ] the recovery thereof in a class action." Section 5106(a) contains no such authorization.

Appendix B

Plaintiffs do not deny that § 5106(a) is devoid of authorizing language, but cite to an implementing regulation, Part 65-3.9(c) of Title 11 of the N.Y.C.R.R., as support for their contention that a class action is permissible here. That regulation, which refers to "a class action brought for payment of [overdue] benefits," prescribes the accrual date for the statutory interest that would accompany such benefits in the event of a judgment.[4] N.Y.C.R.R. tit. 11 § 65-3.9(c). Plaintiffs contend that this reference illustrates that "New York's statutory no-fault scheme expressly contemplates the recovery of the interest penalty in a class action setting. . . ." Pls. Mem. at 17.

Plaintiffs' conclusion that such language overcomes § 901(b)'s prohibition of class actions is incorrect. To begin with, § 901(b) states that, where penalties are created by statute, the statute itself must authorize the

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4. Part 65-3.9(c) of Title 11 of the N.Y.C.R.R. provides:

> If an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken. If any applicant is a member of a class in a class action brought for payment of benefits, but is not a named party, interest shall not accumulate on the disputed claim or element of claim until a class which includes such applicant is certified by court order, or such benefits are authorized in that action by Appellate Court decision, whichever is earlier.

use of a class action to recover those penalties. Therefore, language in an implementing regulation is insufficient. In any event, plaintiffs' argument that § 901(b)'s "unless clause" is triggered because the regulation "expressly contemplates" the recovery of a penalty in a class action is flawed. Even were the language contained in a regulation sufficient, such "contemplation" does not invoke the "unless clause," which requires use of a class action to be "specifically authorized." Finally, the regulation on which plaintiffs rely could, at best, be read to contemplate a class action for the recovery of benefits, not statutory penalties. Indeed, nothing in Part 65-3.9(c) of Title 11 of the N.Y.C.R.R. purports to authorize the use of a class action to recover a penalty; the regulation refers only to a class action "brought for payment of benefits," something not precluded by § 901(b) of the C.P.L.R.

In sum, § 901(b) precludes use of the class action mechanism to collect statutory interest pursuant to § 5106(a). Accordingly, the class action aspect of plaintiffs' § 5106(a) claim is dismissed. Because plaintiff Shady Grove concedes that its individual claim does not meet the amount in controversy requirement under 28 U.S.C. § 1332, this court has no diversity jurisdiction to consider it. Therefore, Shady Grove's individual claim for Allstate's alleged violation of § 5106(a) is dismissed for lack of subject matter jurisdiction.

Appendix B

B. Breach of Contract / Bad Faith Breach of Contract

Plaintiffs request declaratory judgment that contained in Allstate's automobile insurance policies is an "implied representation of fact" that "Allstate will address claims for first-party no-fault benefits in a manner consistent with the requirements of N.Y. Ins. Law § 5106 and 11 NYCRR 65.15." Compl. ¶ 41. Based on this premise, plaintiffs allege that Allstate breached its contractual obligations to Shady Grove, and all others similarly situated, by failing to pay statutory interest on overdue benefits as required by § 5106. In addition, plaintiffs bring a claim for bad faith breach of contract, alleging that Allstate's failure to make interest payments was knowing and intentional, constituting a widespread and systematic failure directed at consumers generally.

Allstate argues that, although plaintiffs have attached a full copy of Allstate's policy to its answering brief, plaintiffs fail to identify any contractual provision in that policy from which such claims can be inferred. In deciding this motion to dismiss, the court can review the policy provided by plaintiffs, even though it was not attached to the complaint, because it is integral to the complaint and was referred to therein. *See Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir.2001); *Schnall v. Marine Midland Bank*, 225 F.3d 263, 266 (2d Cir.2000).

Plaintiffs' claims are based on a theory that Allstate has fully incorporated N.Y. Ins. Law § 5106 into its insurance policies. Indeed, plaintiffs acknowledge that

any contractual rights they claim are derived from § 5106(a) and are not, *e.g.*, bargained-for rights to liquidated damages. Assuming plaintiffs' allegations to be true, Allstate incorporated into its policies not only the obligation to pay statutory interest on overdue benefits pursuant to § 5106(a), but also the limitations associated with recovery of that interest under that statute. Because § 5106(a) does not specifically authorize the use of class actions to recover the statutory penalty, a claim for breach of contract, based on the terms obligating Allstate to comply with § 5106(a), cannot be brought as a class action.

In sum, even if there were an express incorporation of § 5106(a) in the contract, which there is not, plaintiffs could not avoid § 901(b)'s bar on class actions by couching their claim in contractual terms. For that reason, it is unnecessary to address plaintiffs' argument that the contract implicitly incorporates the statute. The class action aspect of plaintiffs' breach of contract and bad faith breach of contract claims is dismissed. Moreover, plaintiff Shady Grove does not, in its individual capacity, assert contractual claims in excess of $75,000. Therefore, those claims fail to meet diversity jurisdiction requirements and are dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is granted in its entirety.

SO ORDERED.

OPPOSITION BRIEF

No. 08-1008

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
620 Eighth Ave., 32d fl.
New York, NY 10018
(212) 218-5554

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5087

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Allstate Insurance Company states that it is a wholly owned subsidiary of a publicly held corporation, The Allstate Corporation, and that no other publicly held corporation owns 10% or more of its stock.

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S. Ct. R. 10 2

INTRODUCTION

This case is governed by a well-known precedent not even cited in the petition: *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Under *Erie*, as every law student learns, "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). To be sure, "[c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Id.* at 416. But it is an endeavor that the federal courts have been undertaking for more than seven decades, and as to which the governing principles of law are very well settled.

The petition here challenges the Second Circuit's application of the *Erie* doctrine to a New York statutory provision, N.Y. C.P.L.R. § 901(b), that prohibits the recovery of certain state statutory penalties through class actions. In particular, petitioner insists that any state law relating to class actions is invariably "procedural" in nature, and thus inapplicable in federal court under *Erie*. But that argument sweeps far too broadly. In analyzing whether a particular state law is "substantive" or "procedural" for *Erie* purposes, a court must carefully analyze the law's effects and its relationship with federal procedural rules. Here, as the Second Circuit recognized, there is no conflict between § 901(b) and any federal rule of civil procedure, and a refusal to apply § 901(b) in federal court not only would frustrate New York's efforts to limit certain state statutory causes of action but also would promote forum-shopping. The petition makes no effort to

address any of these points, but simply repeats the mistaken mantra that any state law relating to class actions is invariably procedural in nature.

For present purposes, of course, the key point is not simply that the decision below is correct, but that petitioner has presented no reason for this Court to review the Second Circuit's application of the well-settled *Erie* doctrine to the particular New York statutory provision at issue here. The Second Circuit's decision was unanimous, and comports with the decisions of all other courts (both inside and outside that Circuit) that have addressed this issue. *See, e.g.*, *In re Onstar Contract Litig.*, No. 2:07-MDL-01867, __ F. Supp. 2d __, 2009 WL 415990, at *14 (E.D. Mich. Feb. 19, 2009); *Gordon v. Kaleida Health*, No. 08-CV-378S, 2008 WL 5114217, at *10 (W.D.N.Y. Nov. 25, 2008); *Gratt v. ETourAndTravel, Inc.*, No. 06-CV-1965, 2007 WL 2693903, at *1-2 (E.D.N.Y. Sept. 10, 2007); *In re Automotive Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549-50 (E.D. Pa. 2007); *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 185-86 (E.D.N.Y. 2007); *Bonime v. Avaya, Inc.*, No. 06-CV-1630, 2006 WL 3751219, at *3 (E.D.N.Y. 2006); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 290-91 (S.D.N.Y. 2005); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004); *United States v. Dentsply Int'l, Inc.*, No. 99-005, 2001 WL 624807, at *16 (D. Del. 2001); *Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72, 84 (S.D.N.Y. 1999). In short, petitioner has identified none of the "compelling reasons" for this Court to exercise its discretion to grant review, S. Ct. R. 10, and accordingly this Court should deny the petition.

RELEVANT STATUTORY PROVISION

Section 901 of New York's Civil Practice Law and Rules provides in its entirety as follows:

§ 901. Prerequisites to a class action

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

N.Y. C.P.L.R. § 901.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case arises out of a May 2005 automobile accident in which one Sonia Galvez was injured. *See* Pet. App. 21a. After the accident, Ms. Galvez sought medical treatment for her injuries from petitioner Shady Grove Orthopedic Associates, P.A., a Maryland orthopedic clinic. *See id.* As part of her payment for those services, Ms. Galvez assigned Shady Grove certain rights to payment from her automobile insurer, respondent Allstate Insurance Company, under her "New York Private Passenger Auto Insurance Policy." *See id.*

Shady Grove sought and received payment for those services from Allstate. Nonetheless, Shady Grove took the position that Allstate should have made those payments more quickly, and that its failure to do so violated a New York insurance statute, N.Y. Ins. Law § 5106(a). Shady Grove thus claimed that Allstate was liable for a statutory 2% monthly interest penalty, which in this case amounted to about $500. Pet. App. 4a.

B. Procedural History

Shady Grove filed this putative class action against Allstate in federal court in April 2006, invoking federal jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). In particular, Shady Grove alleged that federal jurisdiction under CAFA was warranted because the putative class sought statutory interest penalties of more than $5 million under New York law, and there was at least minimal diversity of citizenship between the parties. *See* Pet. App. 20a. Shady Grove

conceded that there was no basis for federal jurisdiction other than CAFA, given the modest size of Shady Grove's individual claim against Allstate. *See id.* at 4a, 34a, 36a.

Allstate moved to dismiss the action, and the district court (Gershon, J.) granted the motion. *See* Pet. App. 19-36a. Because § 901(b) by its plain terms precludes Shady Grove from bringing a class action to recover statutory penalties under New York law, the court explained, the only question was whether that statute applies in federal as well as state court under *Erie*. *See* Pet. App. 26-29a, 33-34a. Concluding, as have other courts, that it does, the court granted the motion to dismiss. *See id.* at 36a.

A unanimous panel of the Second Circuit affirmed. *See* Pet. App. 1-18a. The Second Circuit agreed with the district court that § 901(b) was "substantive," rather than "procedural," for *Erie* purposes because it would lead to very different results in federal than in state court, and thus encourage forum-shopping. *See* Pet. App. 15-16a. The court also emphasized that nothing in § 901(b) conflicts with Rule 23 of the Federal Rules of Civil Procedure, which establishes the criteria for class certification in federal court. *See* Pet. App. 10-14a. And the court rejected the notion that applying § 901(b) in federal court would offend basic tenets of federalism, noting that § 901(b) is a *state*-law limitation on a *state*-law cause of action. *See* Pet. App. 16-17a.

REASON FOR DENYING THE WRIT

The Decision Below Is Correct And Does Not Warrant This Court's Review.

Shady Grove contends that this Court's review is warranted to reaffirm the principle that "state legislatures cannot properly dictate procedure in the federal courts." Pet. 8. But there is no dispute here about that principle. Rather, the dispute here is about whether § 901(b) is properly characterized as "substantive" or "procedural" for *Erie* purposes in the first place. Shady Grove does no more than assume the answer to that fundamental question. That assumption is unwarranted.

As a threshold matter, there is no question that Shady Grove could not pursue this case as a class action in the courts of New York. The petition does not deny that § 901(b) means what it says—namely, that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" in the absence of specific statutory authorization, which concededly is lacking here. Thus, the only question presented in this case is whether Shady Grove can evade that prohibition by filing this putative class action in federal court.

The answer to that question, as the Second Circuit explained, is no, because § 901(b) "is a substantive law" for *Erie* purposes and thus "must be applied in the federal forum, just as it is in state court." Pet. App. 15a. The decision whether a state law is substantive or procedural for *Erie* purposes, as this Court has taught, turns on whether a refusal to apply that law would "[1] have so important an effect upon the fortunes of one or both of the litigants that

failure to apply it would unfairly discriminate against citizens of the forum State, or [2] be likely to cause a plaintiff to choose the federal court." *Gasperini*, 518 U.S. at 428 (internal quotation and brackets omitted); *see also* Pet. App. 9a (setting forth this analysis). The Second Circuit applied precisely this analysis below, concluding that § 901(b) was substantive for *Erie* purposes because a failure to apply that statute in federal court would "[1] allow[] plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court," and "[2] clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the substantial advantages of class actions." Pet. App. 16a (internal quotation omitted); *see also Onstar*, 2009 WL 415990, at *14 (concluding that § 901(b) is "substantive" for *Erie* purposes); *Gordon*, 2008 WL 5114217, at *10 (same); *Gratt*, 2007 WL 2693903, at *1-2 (same); *Automotive Refinishing*, 515 F. Supp. 2d at 550 (same); *Holster*, 485 F. Supp. 2d at 185-86 (same); *Bonime*, 2006 WL 3751219, at *3 (same); *Leider*, 387 F. Supp. 2d at 291 (same); *Relafen*, 221 F.R.D. at 285 (same); *Dentsply*, 2001 WL 624807, at *16 (same); *Dornberger*, 182 F.R.D. at 84 (same).

Nor is there any merit to the suggestion that § 901(b) must be characterized as "procedural" because the criteria for class certification in federal court are set forth in Rule 23 of the Federal Rules of Civil Procedure. As the Second Circuit explained, the criteria for class certification in New York state court are set forth in N.Y. C.P.L.R. § 901**(a)**, not § 901**(b)**. *See* Pet. App. 11a. Rather than setting forth the criteria for class certification, § 901(b) simply provides that certain state-law causes of

action are not amenable to classwide adjudication in the first place. There is no analogue to § 901(b) in the Federal Rules of Civil Procedure. In particular, nothing in Rule 23 either requires or forbids a federal court to certify a class action for any specific claim. "Rule 23 does not control the issue of which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs." Pet. App. 11a. Accordingly, there is no conflict between § 901(b) and Rule 23. *See* Pet. App. 11a; *see also Automotive Refinishing*, 515 F. Supp. 2d at 549 ("[T]here is no real conflict between Rule 23 and CPLR 901(b)."); *Leider*, 387 F. Supp. 2d at 290-91 (same); *Relafen*, 221 F.R.D. at 285 (same); *Dentsply*, 2001 WL 624807, at *16 (same); *Dornberger*, 182 F.R.D. at 84 (same).*

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* As the Second Circuit noted, "[t]he contrary cases brought to our attention by Shady Grove are neither controlling nor relevant." Pet. App. 15a n.6. Both *In re Oot*, 112 B.R. 497, 502 (Bankr. N.D.N.Y. 1989), and *In re Peters*, 90 B.R. 588, 594-95 (Bankr. N.D.N.Y. 1988), involved the class certification criteria set forth in N.Y. C.P.L.R. § 901(a), and merely held that those criteria (as opposed to the class certification criteria set forth in Fed. R. Civ. P. 23) do not apply in federal court. Neither case involved § 901(b), with its distinct prohibition on classwide recovery of certain state statutory penalties. And in *Wesley v. John Mullins & Sons, Inc.*, 444 F. Supp. 117 (E.D.N.Y. 1978), the court responded to the enactment of § 901(b) by (1) decertifying a class that sought to recover statutory penalties under New York law, and (2) dismissing "the class action aspect of plaintiff's claim under [New York law] for lack of jurisdiction over the subject matter." *Id.* at 120. In a footnote, the court mused that it "might" have had jurisdiction over the class claims under state law if the plaintiffs had limited their claims, but then noted that this result "would ...

Finally, Shady Grove errs by arguing that "application of [§ 901(b)] in federal courts would raise fundamental concerns of federalism, allowing state legislatures to dictate to the federal courts the use or nonuse of procedural mechanisms that are otherwise available under the Federal Rules." Pet. App. 16a (internal quotation and brackets omitted). As the Second Circuit explained, "Shady Grove has made no argument that the availability of the class action device in *all* circumstances is an essential characteristic of the federal court system, particularly where the very cause of action that Shady Grove seeks to assert is a creature of New York state statute." *Id.* at 16-17a (emphasis added; internal quotation omitted). Indeed, Shady Grove's approach would turn federalism on its head by flouting New York's prohibition on classwide recovery of certain state statutory penalties. Because New York created the cause of action, federalism commands respect for New York's corresponding decision to limit that cause of action to individual claims.

Shady Grove seems to think that the upshot of the decision below is that "state-law class actions [could] eventually disappear altogether, as more

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circumvent the prohibition against class actions under C.P.L.R. § 901(b)," and thus render "doubtful whether it would be a proper exercise of our discretion to assert pendent jurisdiction under these hypothetical circumstances." *Id.* at 120 n.12. Not surprisingly, thus, the petition does not cite *Oot*, *Peters*, or *Wesley*, and does not identify a single case holding that § 901(b) is procedural, rather than substantive, for *Erie* purposes. *See also* Pet. App. 28-29a (distinguishing *Oot*, *Peters*, and *Wesley*).

state legislatures declare them off limits to the federal courts." Pet. i. But it is unclear why Shady Grove thinks that this possibility should raise any concern for this Court. In our federal system, States are generally free to create—and to limit—causes of action as they see fit. Where, as here, a State decides as a policy matter that particular state-law causes of action may be pursued only on an individual basis, the federal courts have no basis to second-guess that decision.

Rather than addressing the Second Circuit's analysis, Shady Grove simply insists that "the Second Circuit has effectively ceded federal authority to the states" by "permitting New York's legislature to dictate procedure in the federal courts." Pet. 6. But that hyperbole simply assumes the answer to the question whether § 901(b) is "substantive" or "procedural" in the first place. Just because the criteria for certifying a class action are procedural in nature does not mean that *any* state law relating to class actions is invariably procedural in nature for *Erie* purposes. To the contrary, as this Court has recognized time and again, *Erie* requires careful analysis of a challenged state law rather than mechanical application of "substantive" and "procedural" labels. *See, e.g.*, *Gasperini*, 518 U.S. at 427-28 & n.7; *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980); *Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965).

Thus, to conclude that New York's law prohibiting recovery of certain statutory interest penalties on a classwide basis is substantive for *Erie* purposes is not, as Shady Grove would have it, to say

that States are free to establish rules of procedure for the federal courts. It all depends, as this Court emphasized most recently in *Gasperini*, on whether application of the state law in federal court would undermine the twin aims of *Erie*: to prevent unfair discrimination and forum-shopping. *See* 518 U.S. at 428 & n.8. Shady Grove's far-fetched hypotheticals about state laws that regulate deposition or discovery practice in the federal courts, *see* Pet. 7, or require federal judges to wear powdered wigs, *see id.* at 8, thus miss the point: the Second Circuit never held that States may dictate rules of procedure in the federal courts. To the contrary, the whole point of the Second Circuit's analysis, which Shady Grove never addresses, is that § 901(b) is substantive, rather than procedural, for *Erie* purposes.

Apart from challenging the Second Circuit's decision on the merits, Shady Grove has identified no reason whatsoever for this Court to review this case. In particular, Shady Grove has not alleged—because it cannot allege—a circuit conflict on this point. It bears emphasis, in this regard, that this is not an issue that arises only in the Second Circuit; to the contrary, it also has arisen in the lower courts in the First, Third, and Sixth Circuits. *See, e.g.*, *Onstar*, 2009 WL 415990, at *14; *Automotive Refinishing*, 515 F. Supp. 2d at 549-50; *Relafen*, 221 F.R.D. at 285; *Dentsply*, 2001 WL 624807, at *16. Because Shady Grove is challenging no more than the application of settled law to the facts of this case, this Court's review is not warranted.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
620 Eighth Ave., 32d fl.
New York, NY 10018
(212) 218-5554

April 3, 2009

REPLY BRIEF

126 (3)

No. 08-1008

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IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorney for Petitioner

222247

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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In its opposition brief, respondent Allstate Insurance Company chides petitioner for ignoring what it says is the dispositive decision of this Court, *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938), with its familiar holding that state substantive law governs diversity cases. And Allstate repeatedly characterizes the statute in question, section 901(b) of New York's Civil Practice Law and Rules, as a rule of substance rather than procedure — "a *state*-law limitation on a *state*-law cause of action." Opp. at 5 (emphasis in original).

Allstate is fundamentally wrong on both counts. It all but ignores the decision of this Court that sets forth the principles applicable here: *Hanna v. Plumer*, 380 U.S. 460 (1965), which holds that in both diversity and federal question cases in the federal courts, a validly promulgated Federal Rule of Civil Procedure "applies regardless of contrary state law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996) (citing *Hanna*, 380 U.S. at 469-74). Moreover, Allstate's insistence that section 901(b) is a substantive limit on state-law causes of action overlooks that New York state courts apply the 901(b) standard to *federal* as well as state claims *on the ground that it is merely a matter of state-court procedure*. A versatile statute it may be, but it cannot be all things at once: it cannot apply to federal claims in state court because it is procedural, yet also apply to state claims in federal court because it is substantive.

Allstate's position that a class action otherwise proper under Rule 23 cannot be maintained in federal court because of section 901(b) thus reflects (as the Fifth Circuit characterized a similarly erroneous effort to

apply Mississippi's prohibition on class actions to claims brought in federal court), "a fundamental misunderstanding . . . of the principles that the *Erie* doctrine is limited to matters of state substantive law and that cases [in] federal court are governed solely by federal procedure." *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 777 (5th Cir. 2001). The encroachment on federal sovereignty entailed by this effort to import state law to govern procedural matters in the federal courts militates strongly in favor of the petition. The Second Circuit's decision to apply state law to a matter governed by the Federal Rules of Civil Procedure — an extraordinary departure from the body of post-*Hanna* jurisprudence — merits review and correction by this Court.

I.

ALLSTATE'S DEFENSE OF SECTION 901(b) RESTS ON A FUNDAMENTAL MISCHARACTERIZATION OF THE STATUTE

Allstate asserts that section 901(b) is nothing more than a state-law limitation on state-law claims, and that the Second Circuit correctly treated it as such. Opp. at 5. In fact, New York courts have repeatedly applied section 901(b) to federal claims, precisely for the reason that it is procedural. In *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (N.Y. App. Div. 2005), the Appellate Division held that section 901(b) precluded a class action under the federal Telephone Consumer Protection Act, reasoning that "although the TCPA creates a minimum measure of

recovery and imposes a penalty for willful or knowing violations, and the plaintiff is seeking the same, the TCPA does not specifically authorize a class action [as required under section 901(b)]." *Id.*, 799 N.Y.S.2d at 798. Ironically, the court specifically rejected the argument that "CPLR 901(b) is substantive in nature and, therefore, should not be applied" to a federal cause of action. *Id.* Rather, the court held that the application of this "for[m] of local practice" was not incompatible with the goals of the TCPA, *id.* at 800, and thus was permissible in light of this Court's recognition that "States may establish the rules of procedure governing litigation in their own courts" as long as they do not "defeat" federal rights. *Id.* at 799 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

The Appellate Division has likewise looked to section 901(b) in determining whether to allow class actions to proceed on other purely federal claims. In *Vickers v. Home Fed. Sav. & Loan Ass'n of E. Rochester*, 390 N.Y.S.2d 747 (N.Y. App. Div. 1977) the court allowed a New York class action to proceed under the Truth In Lending Act on the ground that TILA's provisions expressly authorize class actions as required under section 901(b). *Vickers*, 390 N.Y.S.2d at 748. Similarly, the court in *Felder v. Foster*, 421 N.Y.S.2d 469 (N.Y. App. Div. 1979), *appeal dismissed*, 49 N.Y.2d 800 (N.Y. 1980), found that a class action under section 1983 of the Civil Rights Act passed muster under CPLR 901(b). *Felder v. Foster*, 421 N.Y.S.2d at 471 ("CPLR 901(b) does not preclude a class action where plaintiffs seek punitive damages under section 1983 . . . since such damages are not a 'penalty' or 'minimum measure of recovery created or imposed by statute'") (citations omitted).

The New York state courts' treatment of section 901(b) as a generally applicable procedural rule rather than a limitation only on specific state-law rights of action is understandable, because the statute itself says nothing to suggest that it is limited to state-law claims. It is merely a subpart of a section of New York's Civil Practice Law and Rules that is exclusively devoted to procedural matters and is, indeed, the state's direct analog to Federal Rule of Civil Procedure 23. That Allstate's defense of section 901(b)'s application in this case rests so heavily on claiming that it is something it is not strongly undermines its assertion that the Second Circuit's application of the statute to defeat a class action otherwise appropriate under Rule 23 does not merit this Court's attention.

II.

THE "PROCEDURE VS. SUBSTANCE" DEBATE DOES NOT LESSEN THE NEED FOR REVIEW

Allstate says that our federalism argument simply takes for granted that CPLR 901(b) is procedural and not substantive. But in addition to overlooking the state law that strongly supports our view, Allstate misapprehends the argument. The point is not so much that section 901(b) is procedural (though it is); the point is that the *class action device* is procedural — so that its use in federal court cannot properly be limited by state legislatures, any more than state legislatures may enact (ostensibly substantive) laws that limit the use of interrogatories, document requests or depositions in federal court. As the Seventh Circuit held in *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997), the

requisites for certification of a class are "a matter of procedure, not substance," and "[t]he application of Rule 23 does not abridge, enlarge or modify any substantive right," *id.*. at 346; hence federal courts must apply Rule 23 in considering whether to certify a class notwithstanding rules of state law that seek to impose additional restrictions on when a class may be certified. *Id.*

Nor does Allstate's "conflict" analysis obviate the need for review. Section 901(b) is at odds with Rule 23 in precisely the manner that this Court and other federal courts have held creates a conflict that must be resolved in favor of application of the federal rule (consistent with *Hanna v. Plumer*): Rule 23 grants federal courts the discretion to certify class actions seeking statutory penalties if the Rule's extensive criteria are satisfied, while section 901(b) would deny such discretion. That is exactly the sort of "conflict" that this Court saw in *Burlington Northern RR Co. v. Woods*, 480 U.S. 1 (1987), where the affected federal rule was "sufficiently broad" to "control the issue," *id.* at 4-5, by allowing the federal court discretion that the state rule purported to deny. *Id.* at 7. Just as in *Burlington Northern*, there is no room for the operation of a state rule that purports to divest the federal courts of the discretion to certify a class that Rule 23 would otherwise provide.

Similarly, in *Mace*, the Seventh Circuit found enough of a "conflict" to invoke the principles of *Hanna* where a state rule purported to impose a notice requirement before a class action could be filed. Because Rule 23 does not require such notice (just as it does not prohibit class actions that seek statutory penalties), the court held

that the state rule, with its additional barrier to class certification, could not be applied. *See* 109 F.3d at 345-46. As one district court following *Mace* has explained, "Rule 23 does indeed set up the criteria for determining whether to certify a class," and a state statute that purports to deny some category of plaintiffs the ability to pursue a class action "adds another criterion . . . not contemplated by Rule 23's requirements of numerosity or commonality of issues"; moreover, "this criterion conflicts with Rule 23, and in such situations, the federal rule controls." *In Re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, 205 F.R.D. 503, 516 (S.D. Ind. 2001), *rev'd in part on other grounds*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).[1]

Allstate's much narrower view of conflict, by contrast, fails to preserve the authority of the federal courts to govern their own procedure. The French Republic may have any number of laws that do not conflict with the Federal Rules of Civil Procedure in the

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1. We note also that the commentary to section 901(b) acknowledges that

> CPLR 901(b) contains a substantive variance from the federal rule. In New York, class actions may not be used to recover a statutory "penalty" or "minimum measure of recovery" unless the statute in question specifically authorizes class-wide recovery.

N.Y. C.P.L.R. §901(b) note (McKinney 2007). Of course, Allstate itself argues that applying section 901(b) "would lead to very different results" than would be obtained under Rule 23 — though here Allstate presumably speaks of *procedural* results (since class treatment does not determine the outcome on the merits). *See* Opp. at 5.

sense Allstate would require. But the absence of such conflict is not a license for the French parliament to dictate when, how or whether federal procedural devices may be used in United States courts.

In our petition we noted that the Second Circuit's analysis would allow state legislatures to prohibit the use of interrogatories (for example) in federal diversity cases arising under state law. Allstate's only answer is to dismiss that prospect as "far-fetched." Yet the point of such hypotheticals is not prediction, but rather to illustrate the irreconcilability of the Second Circuit's ruling with our federal scheme of government. Though we share Allstate's confidence in the good intentions of state legislatures, under Allstate's analysis those good intentions are the only thing preventing our hypotheticals from coming to pass.

III.

REVIEW IS WARRANTED TO SAFEGUARD THE AVAILABILITY OF CLASS ACTIONS IN FEDERAL DIVERSITY CASES

In our petition we asked whether state law class actions might eventually disappear altogether, as more state legislatures (following New York's lead) declare them off limits to the federal courts. Far from denying that prospect, Allstate responds only by questioning why this Court should care.

This Court has an obvious and compelling interest in addressing state encroachments on federal sovereignty and federal court procedure. Moreover, the

importance and utility of the class action device (as it is employed in the federal courts) have been widely acknowledged by Congress, commentators and the federal judiciary. In enacting the Class Action Fairness Act, for example, Congress expressly found that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Act Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). A comprehensive study by the Rand Institute for Civil Justice likewise concluded that "research suggests that [class action] lawsuits do play a regulatory enforcement role in the consumer arena." *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Rand Institute for Civil Justice, March 24, 1999, at 9. The Federal Judicial Center has reached the same conclusion. MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES (Federal Judicial Center 2005), at 1 (noting that class actions reach "fraudulent marketplace conduct that might otherwise escape regulation.") *And see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("Class actions serve an important function in our system of civil justice.")

The prospect of state legislatures pulling the class action rug out from under the federal courts may not concern Allstate Insurance Company; but it should concern this Court.

IV.

THE ISSUE IS FEDERALISM, NOT FORUM SHOPPING

The class action device is, again, procedural; it does not decide the merits, and does nothing to determine whether or not any class member is entitled to recover. Allstate's liability to Shady Grove thus turns entirely on the merits, and not on whether Shady Grove may ultimately act in a representative capacity. Similarly, and in the unhappy event that this case is not maintained as a class action, absent class members will retain the right to sue Allstate in individual actions. The legal right of absent class members to recover against Allstate (as opposed to their practical ability to do so) does not depend in the slightest on class certification. Therefore, "[w]hether that substantive right can be vindicated through a class action or whether it must be pursued individually is a procedural question." *Bridgestone/Firestone*, 205 F.R.D. at 515.

In other words, neither the availability nor the unavailability of the class action device constitutes a substantive "result." That being the case, forum shopping is not an issue: there should be no different substantive result in federal court than would be achieved in state court for any individual claim. Nor can any litigant be genuinely accused of forum shopping simply because he or she displays a preference for procedural mechanisms (here, the class action device) that might be available in one court but not another. As Justice Harlan observed, "litigants often choose a federal forum merely to obtain what they consider the

advantages of the Federal Rules of Civil Procedure . . . ." *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J. concurring).

The issue here is thus not one of forum shopping, but of federalism: *whether a state legislature may properly dictate the use or nonuse of federal procedural devices in the federal courts.* To resolve this important question, the writ should be granted.

CONCLUSION

For the reasons stated above, and for the reasons set forth in Shady Grove's petition, Shady Grove respectfully requests that writ of certiorari be allowed.

Respectfully submitted,

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorney for Petitioner

JOINT APPENDIX

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No. 08-1008

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

JOINT APPENDIX

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
SNELSON@CITIZEN.ORG

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorneys for Petitioner

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
(202) 879-5087
CLANDAU@KIRKLAND.COM

ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
620 8th Avenue, 32d Fl.
New York, NY 10018
(212) 218-5554

Attorneys for Respondent

July 2009

PETITION FOR WRIT OF CERTIORARI FILED FEB. 6, 2009
CERTIORARI GRANTED MAY 4, 2009

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The following documents have been omitted from the Joint Appendix because they were reproduced in the Appendix to the Petition for a Writ of Certiorari. The page numbers listed below are the pages where the items are found in the Appendix to the Petition.

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Opinion of the United States Court of Appeals for the Second Circuit, November 19, 2009 ..... Pet. App. 1a

General Docket
US Court of Appeals for the Second Circuit

Second Circuit Court of Appeals

INDIV
CLOSED

Court of Appeals Docket #: 07-0141-cv
Nsuit : 4110 CONTRACT-Insurance

Shady Grove Orthopedic Associates v. Allstate Insurance Company — Filed 1/12/07

Appeal from: EDNY (BROOKLYN)

Case type information:

Civil

Private

None

Lower court information:

District: 06-cv-1842

Trial Judge: Nina Gershon

MagJudge: Kiyo A. Matsumoto

Date Filed: 04/20/06

Date order/judgement: 12/20/2006

Date NOA filed: 1/11/2007

Fee status: Paid

Panel Assignment:

Panel: JAC RSP RAK 500 Pearl

Date of decision: 11/19/08

Prior cases: NONE

Current cases NONE

* * *

1/12/07 Copy of notice of appeal and district court docket entries on behalf of APPELLANT Shady Grove Orthopedic Associates, P.A., Sonia Galvez, filed. [Entry date Jan 23 2007] [JP]

* * *

9/10/08 Case heard before CABRANES, POOLER, KATZMANN, C.JJ. CD Date: 9/10/08 [Entry date Sep 10 2008] [LY]

11/19/08 Judgment of the district court is AFFIRMED by published signed opinion filed. (RSP) [Entry date Nov 19 2008] [AO]

11/19/08 Judgment filed. [Entry date Nov 19 2008] [AO]

* * *

12/11/08 Judgment MANDATE ISSUED. CLOSED [Entry date Dec 11 2008] [EJ]

* * *

5/11/09 Letter dated 05/04/9 from the Supreme Court advising of order granting petition for writ of certiorari by APPELLANT Shady Grove Orthopedic Associates, P.A., filed. (Supreme Court # 08-1008) [Entry date May 11 2009] [AO]

5/11/09 Writ of Certiorari GRANTED. [Entry date May 11 2009] [AO]

* * *

U.S. District Court
Eastern District of New York (Brooklyn)
CIVIL DOCKET FOR CASE #:
1:06-cv-01842-NG-KAM

Shady Grove Orthopedic Associates, P.A. et al v. Allstate Insurance Company

Assigned to: Senior Judge Nina Gershon

Referred to: Magistrate Judge Kiyo A. Matsumoto, MJ

Cause: 28:1332 Diversity-Insurance Contract

Date Filed: 04/20/2006

Date Terminated: 12/20/2006

Jury Demand: Plaintiff

Nature of Suit: 110 Insurance

Jurisdiction: Diversity

* * *

Date Filed	#	Docket Text
04/20/2006	1	COMPLAINT against Allstate Insurance Company $ 350, filed by Shady Grove Orthopedic Associates, P.A., Sonia E. Galvez.(Attachments: # 1 Civil Cover Sheet)(Bowens, Priscilla) (Entered:04/21/2006)
		* * *
07/12/2006	11	MOTION to Dismiss by Allstate Insurance Company. * * * (Hahn, Andrew) (Entered: 07/12/2006)
		* * *

11/21/2006	18	Minute Entry for proceedings held before Nina Gershon: Pre Motion Conference held on 11/21/2006. Oral argument held. Decision reserved. (Court Reporter Fred Guerino) (Guzzi, Roseann) (Entered: 12/28/2006)
12/15/2006	16	ORDER granting 11 defendant's motion to dismiss. The Clerk of Court is directed to close the case. Ordered by Judge Nina Gershon on 12/15/2006. (Porpora, Matthew) (Entered: 12/15/2006)
12/20/2006	17	JUDGMENT dated 12/15/06 that plaintiffs take nothing of the defendant; and that defendant's motion to dismiss is granted in its entirety. (Ordered by Robert C. Heinemann, Clerk of Court on 12/15/06) (Guzzi, Roseann) (Entered: 12/20/2006)
01/11/2007	19	NOTICE OF APPEAL by Shady Grove Orthopedic Associates, P.A., Sonia E. Galvez. Filing fee $ 455, receipt number 2180572. (Spadaro, John) Modified on 1/12/2007 (Gonzalez, Mary). (Entered: 01/11/2007)

* * *

02/24/2009	22	MANDATE of USCA as to 19 Notice of Appeal filed by Sonia E. Galvez, Shady Grove Orthopedic Associates, P.A. It is Ordered that the judgment of the District Court is Affirmed. Allstate's motion to strike the new

arguments raised in points VI and VII of Appellant's Reply is granted in accordance with the opinion of this Court. Issued as Mandate: 12/11/08. Received from USCA on 2/4/09. USCA#07–0141–cv. (Attachments: # 1 opinion) (McGee, Mary Ann) (Entered: 02/26/2009)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A. and SONIA E. GALVEZ, on behalf of themselves and all others similarly situated,	)	C.A. No.:CV 06 1842
Plaintiffs,	)	TRIAL BY JURY DEMANDED
v.	)	Filed in Clerk's Office U.S. District Court E.D.N.Y. April 20, 2006 Brooklyn Office
ALLSTATE INSURANCE COMPANY,	)	
Defendant.	)	GARAUFIS, J. MATSUMOTO, M.J.

CLASS ACTION COMPLAINT

Plaintiffs Shady Grove Orthopedic Associates, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated, allege as follows:

Introduction: Nature of the Action and Summary of Facts

1. This is an action seeking recovery of compensatory damages, treble damages and declaratory and other relief arising from defendant Allstate Insurance Company's violations of N.Y. Ins. Law §5106(a) and N.Y. Gen. Bus. Law §349(a); its breaches of contract and bad faith breaches of contract; and its otherwise wrongful failure to pay statutory interest

owed to thousands (if not tens of thousands) of New York consumers on overdue no-fault insurance benefits. This action does not seek recovery of the benefits themselves, which in most instances have already been paid by defendant Allstate Insurance Company ("Allstate") without dispute. Rather, this action seeks payment of statutory interest wrongly and knowingly withheld by Allstate in connection with overdue benefit payments.

2. This is a proposed class action brought on behalf of those of Allstate's New York insureds who, during the period April 20, 2000 to the present, submitted covered claims for first-party insurance benefits under no-fault coverages issued as part of Allstate's automobile insurance contracts; but whose claims, though not disputed by Allstate in any timely fashion, either 1) remain unpaid by Allstate after the expiration of the thirty-day period under N.Y. Ins. Law §5106(a), or 2) were paid by Allstate only after the expiration of that thirty-day period.

Jurisdiction and Venue

3. The Court has jurisdiction over this action pursuant to 28 U.S.C. §1332(d)(2)(A).

4. Venue is properly placed in this Court pursuant to 28 U.S.C. §1391(b)(1) and (2).

The Parties

5. Plaintiff Shady Grove Orthopedic Associates, P.A. ("Shady Grove") is a Maryland corporation established for the practice of orthopedic medicine. Shady Grove's employees have rendered medical care and physical therapy to plaintiff Sonia E. Galvez in connection with injuries she suffered in a certain

May 30, 2005 automobile collision (as more fully described below).

6. Plaintiff Sonia E. Galvez is a natural person residing at 14611 Bubbling Spring Road, Boyds, MD 28041, and a named insured under Allstate "New York Private Passenger Auto Insurance Policy" 0 73 885752 02/22, effective February 22, 2005 and still in effect as of May 30, 2005. Ms. Galvez has assigned to Shady Grove certain of her rights with respect to first-party no-fault benefits under the subject Allstate policy.[1] As more fully described below, Ms. Galvez has tendered claims for such benefits through Shady Grove, and under the Allstate policy.

7. Defendant Allstate Mutual Automobile Insurance Company is an Illinois corporation with offices at 3075 Sanders Road, Suite H1A, Northbrook, IL 60062. It is engaged in the business of insurance, and regularly sells automobile insurance within the State of New York.

Factual Background Applicable to the Proposed Class

8. Allstate is a prolific underwriter of automobile insurance, including first-party no-fault benefits for persons injured while driving or occupying motor vehicles.

9. Since at least April 2000 Allstate has been among the most prolific underwriters of automobile insurance (including no-fault coverage) in the State

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[1] Ms. Galvez's assignment of rights to Shady Grove is evidenced by the documents attached as Exhibit A.[Omitted from Joint Appendix.]

of New York. At all times relevant to this case, Allstate has derived substantial revenues and profits from the sale of such insurance products in New York.

The Thirty-Day Standard

10. Under N.Y. Veh. & Traf. Law §319(1) (part of New York's Motor Vehicle Financial Security Act), persons who own any motor vehicle registered in New York or operate or permit to be operated a motor vehicle in New York must maintain specified forms of liability insurance.

11. Under N.Y. Ins. Law §5103(a), liability insurance issued in satisfaction of the requirements of N.Y. Veh. & Traf. Law §319 must also provide for the payment of first-party insurance benefits to specified categories of persons, and for loss arising out of the use or operation of the insured motor vehicle within the State of New York. These first-party benefits (sometimes referred to as "no-fault" benefits) include, by virtue of the definitions set forth in N.Y. Ins. Law §5102, payments to reimburse persons for medical and other expenses up to $50,000 per person, where such expenses are incurred on account of personal injury arising out of the use or operation of a motor vehicle.

12. Under N.Y. Ins. Law §5106(a), payment of first-party no-fault benefits pursuant to section 5103 must be made as the loss is incurred. Section 5106(a) further provides that such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of the loss sustained. Section 5106(a) also provides that overdue benefits shall bear interest at the rate of two percent per

month. Under 11 NYCRR 65.15(h)(1), interest owed pursuant to N.Y. Ins. Law §5106(a) is compounded and calculated on a *pro rata* basis using a thirty-day month.

13. Regulations promulgated by New York's Insurance Department likewise govern the processing of claims for first-party no-fault benefits under New York's Insurance Law. Under 11 NYCRR 65.15(d)(1), an insurer may request verification of the claim for no-fault benefits within ten business days of its receipt of any completed application for the same. Such verification must be requested (if at all) through the use of prescribed forms as specified by 11 NYCRR 65.15(c)(3), including New York State Form N-F3 (Verification of Treatment by Attending Physician or Other Provider of Health Services) and New York State Form N-F4 (Verification of Hospital Treatment).

14. If an insurer makes a timely request for verification under 11 NYCRR 65.15(d)(1), the time within which the insurer must pay the claim for no-fault benefits is tolled pending the insurer's receipt of the requested verification. If the requested verification is not supplied to the insurer within thirty days of the original request, then 11 NYCRR 65.15(e)(2) requires the insurer to communicate to the claimant a follow-up request for verification within ten days thereafter. The regulations further provide, under 11 NYCRR 65.15(d)(2), that an insurer may request additional verification within ten business days of its receipt of one or more completed verification forms.

15. Under 11 NYCRR 65.15(g)(1)(i), no-fault benefits are overdue if not paid within thirty days after the insurer receives verification of all relevant infor-

mation requested pursuant to 11 NYCRR 65.15(d) (in cases where such a request is made). N.Y. Ins. Law §5106(a) provides that such overdue benefits shall bear interest at the rate of two percent per month. Under 11 NYCRR 65.15(h)(1), such interest is compounded and calculated on a pro rata basis using a thirty-day month.

16. The effect of the regulatory scheme established under N.Y. Ins. Law §§5102, 5103 and 5106, in combination with the provisions of 11 NYCRR 65.15, is to require insurers to pay covered no-fault benefits within thirty days of the claimant's submission of proof of the fact and amount of loss sustained, or (in cases where the insurer makes any timely request for verification) within thirty days of the insurer's receipt of all requested verification. The same regulatory scheme makes no-fault insurers liable for payment of an interest penalty on overdue benefits, compounded and calculated at the rate of two percent per month.

Allstate's Wrongful Conduct

17. Allstate routinely fails to pay covered claims for first-party no-fault benefits within thirty days of the claimant's provision of proof of the loss, in violation of N.Y Ins. Law §5106(a) and NYCRR 65.15.

18. Allstate routinely fails to pay covered claims for first-party no-fault benefits within thirty days of its receipt of the claimant's completed verification forms, in violation of 11 NYCRR 65.15.

19. In addition to violating the thirty-day payment standard under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15, Allstate routinely ignores its obligation to pay the statutory interest owed in such cases.

Allstate thus owes to the plaintiff Ms. Galvez, and to all members of the proposed class, interest under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1).

20. On those occasions when Allstate fails to pay covered claims for first-party no-fault benefits within the thirty-day period under N.Y. Ins. Law §5106(a), Allstate routinely and falsely claims to have never received the insured's proof of loss in the first instance, all as a means of avoiding the consequences of its violation of the thirty-day standard.

Allegations Specific to the Proposed Class Representatives

21. Ms. Galvez was injured in an automobile collision on or about May 30, 2005. At the time of the collision, Ms. Galvez was driving a 2005 Toyota Corolla registered in the State of New York and bearing New York tag no. CZH3872 (the "insured vehicle").

22. On or about May 30, 2005, the insured vehicle was insured under Allstate "New York Private Passenger Auto Insurance Policy" no. 0 73 885752 02/22.

23. Ms. Galvez has tendered to Allstate (through Shady Grove) claims for first-party no-fault benefits under N.Y. Ins. Law §5106 and 11 NYCRR 65.15, and in connection with the injuries she suffered as a result of the May 30, 2005 collision.

24. With respect to the claims referenced by the preceding paragraph, Allstate has failed to make timely payment of benefits, in violation of the thirty-day standard under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(g)(1)(i). Such benefits thus constitute overdue benefits within the meaning of N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(g)(1)(i).

25. Allstate has failed to pay to Ms. Galvez the interest owed to her under N.Y. Ins. Law §5106 and 11 NYCRR 65.15.

26. Allstate has failed to pay to Shady Grove the interest owed to it under N.Y. Ins. Law §5106 and 11 NYCRR 65.15.

27. Allstate has claimed falsely that one or more of the claims for first-party no-fault benefits tendered by Ms. Galvez through Shady Grove (as alleged in paragraph 23 above) was not received by Allstate on the date(s) when such claims had in fact been received. Allstate has made these false claims for the purposes of avoiding the consequences of its violation of the thirty-day payment standard under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1).

Class Certification Allegations

28. Allstate owes to Ms. Galvez, and to all members of the proposed class, interest under N.Y. Ins. Law §5106 and 11 NYCRR 65.15.

29. Allstate owes to Shady Grove, and to all members of the proposed class, interest under N.Y. Ins. Law §5106 and 11 NYCRR 65.15.

30. This action is brought and may properly be maintained as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(1)(A), (2) and (3). Ms. Galvez and Shady Grove bring this action on behalf of themselves and all others similarly situated, as representatives of the following proposed class: All persons to whom Allstate owes interest under N.Y. Ins. Law §5106 and 11 NYCRR 65.15 with respect to claims for first-party no-fault benefits arising since April 20, 2000.

31. Specifically excluded from the proposed class are those persons who have already secured recovery against Allstate in connection with the conduct complained of, whether by settlement or judgment; and Allstate's officers, directors, employees, agents or legal representatives, or the successors or assigns of any of them.[2]

32. *Numerosity of the Class (Fed. R. Civ. P. 23(a)(1))*. The proposed class is so numerous that the individual joinder of all its members is impracticable. Allstate has been, at all relevant times, among New York's most prolific underwriters of no-fault coverage; and it remains so today. While the exact number and identities of the proposed class members is presently unknown, and can only be determined through investigation and discovery, plaintiff is informed and believes that the proposed class includes over 1,000 members.

33. *Existence and Predominance of Common Questions of Law and Fact (Fed. R. Civ. P. 23(a)(2), 23(b)(3))*. Common questions of law and fact exist as to all members of the proposed class, and predominate over any individual questions. They include, without limitation, the following:

a. Whether Allstate owes interest to the proposed class members under N.Y. Ins. Law §5106 and 11 NYCRR 65.15;

b. Whether Allstate's conduct is in violation of N.Y. Gen. Bus. Law §349;

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[2] For purposes of this paragraph 31, no purported settlement or compromise in violation of 11 NYCRR 65.15(h)(2) shall constitute a settlement.

c. Whether Allstate's conduct constitutes a knowing or willful violation of N.Y. Gen. Bus. Law §349;

d. Whether the proposed class is entitled to compensatory damages, and if so, the amount of such damages;

e. Whether the proposed class is entitled to treble damages under N.Y. Gen. Bus. Law §349(h), and if so, the amount of such damages; and

f. Whether the proposed class is entitled to recovery of its reasonable attorneys' fees under N.Y. Ins. Law §5106(a), 11 NYCRR 65.15(i)(1), N.Y. Gen. Bus. Law §349(h) or otherwise, and if so, the amount of such fees.

34. *Typicality of Claims (Fed. R. Civ. P. 23(a)(3)).* The proposed class representatives' claims are typical of the claims of the members of the proposed class. Ms. Galvez and/or Shady Grove are currently owed interest by Allstate under N.Y. Ins. Law §5106 and 11 NYCRR 65.15. All members of the proposed class are likewise owed such interest.

35. *Adequacy of Representation (Fed. R. Civ. P. 23(a)(4)).* Ms. Galvez and Shady Grove are under no actual or potential conflict of interest with respect to other members of the proposed class, and will fairly and adequately protect their interests. They have retained attorneys experienced in the prosecution of complex litigation, complex coverage litigation, no-fault litigation, and no-fault-related class action litigation.

36. *Superiority of Class Action (Fed. R. Civ. P. 23(b)(3)).* A class action is superior to other available methods of adjudication for this dispute, because individual joinder of all members of the proposed class

is impracticable, and no other method of adjudication of the claims asserted herein is more efficient and manageable. Further, the damages suffered by individual members of the proposed class may be relatively modest, so that the burden and expense of prosecuting individual actions would make it difficult or impossible for such members to obtain relief. The prosecution of such individual actions would also impose a substantial burden on New York's civil justice system. At the same time, individualized litigation would entail a significant risk of varying, inconsistent or contradictory judgments, and would magnify the delay and expense to all parties and the courts, by requiring multiple trials for the same complex factual issues. By contrast, the class action mechanism presents fewer case-management problems; conserves the resources of the parties and the courts; and protects the rights of each member of the proposed class. The proposed class members thus have little interest in individually controlling the prosecution of separate actions; and to counsel's knowledge, there has been no substantial litigation of this dispute in any forum. It is not anticipated that the prosecution of this dispute as a class action will entail any special case-management difficulties; and notice of the pendency of this action, and of any resolution of the same, can be provided to the proposed class by publication and/or individual notice.

37. *Other Grounds for Certification*. This action is also certifiable under Federal Rule of Civil Procedure 23(b)(1) and (2) because:

a. The prosecution of separate actions by the individual members of the proposed class would create a risk of inconsistent or varying adjudications with re-

spect to such individual class members, thus establishing incompatible standards of conduct for Allstate; and

b. Allstate has acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory relief with respect to the class as a whole.

COUNT I

Declaratory Judgment

38. Plaintiffs Shady Grove Orthopedic Associates, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 37 above.

39. Ms. Galvez's claims and the claims of all proposed class members arise under policies of automobile insurance issued by Allstate.

40. Shady Grove's claims (as Ms. Galvez's assignee) and the claims of all proposed class members arise under policies of automobile insurance issued by Allstate.

41. An implied representation of fact contained in all the subject automobile insurance policies is that Allstate will address claims for first-party no-fault benefits in a manner consistent with the requirements of N.Y. Ins. Law §5106 and 11 NYCRR 65.15.

42. Allstate denies or will deny that the implied representation of fact described in the preceding paragraph is contained in the subject insurance contracts.

43. Allstate has failed to address the proposed class members' claims for first-party no-fault benefits

in a manner consistent with the requirements of N.Y. Ins. Law §5106 and 11 NYCRR 65.15.

44. An actual controversy of a justiciable nature exists between Ms. Galvez and/or Shady Grove, on behalf of themselves and all others similarly situated (on the one hand) and Allstate (on the other), concerning the parties' rights and obligations under the affected Allstate insurance contracts. That controversy turns on Allstate's obligation *vel non* to pay interest for overdue benefits under N.Y. Ins. Law ¶5106 and 11 NYCRR 65.15. The controversy is of sufficient immediacy to justify the entry of a declaratory judgment.

45. An award of declaratory relief by this Court will terminate some or all of the existing controversy between the parties.

COUNT II

Breach of Contract

46. Plaintiffs Shady Grove Orthopedic Associates, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 45 above.

47. Ms. Galvez's claims, Shady Grove's claims and the claims of all proposed class members arise under policies of automobile insurance issued by Allstate.

48. An implied representation of fact contained in all the subject automobile insurance policies is that Allstate will address claims for first-party no-fault benefits in a manner consistent with the requirements of N.Y. Ins. Law §5106 and 11 NYCRR 65.15. By failing to pay interest on overdue benefits as re-

quired by N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1), Allstate has failed to honor this implied representation of fact, and thereby breached the affected contracts of automobile insurance.

49. As a direct result of Allstate's breaches of the affected insurance contracts, Ms. Galvez, Shady Grove and all others similarly situated have been deprived of interest payments to which they are entitled under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1).

COUNT III

Bad Faith Breach of Contract

50. Plaintiffs Shady Grove Orthopedic Associates, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 49 above.

51. Allstate's failure to pay interest owed to Ms. Galvez, Shady Grove and all members of the proposed class under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1) is a widespread and systematic failure, directed at consumers generally. Allstate has engaged in the wrongful withholding of such interest on a large enough scale to prove that its conduct is knowing and intentional.

52. Allstate's failure to pay interest owed to Ms. Galvez, Shady Grove and all members of the proposed class under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1) is without reasonable basis.

53. Allstate's failure to pay interest owed to Ms. Galvez, Shady Grove and all members of the pro-

posed class under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1) is in bad faith.

54. As a direct result of Allstate's bad-faith breaches of the affected insurance contracts, Ms. Galvez, Shady Grove and all others similarly situated have suffered and will suffer injury as heretofore alleged.

COUNT IV

Violations of N.Y. Ins. Law §5106

55. Plaintiffs Shady Grove Orthopedic Associates, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 54 above.

56. Allstate has violated N.Y. Ins. Law §5106(a) by failing to pay interest owed thereunder to Ms. Galvez, Shady Grove and all proposed class members.

57. As a direct result of Allstate's violations of N.Y. Ins. Law §5106(a), Ms. Galvez, Shady Grove and all others similarly situated have suffered and will suffer injury as heretofore alleged.

COUNT V

Violations of N.Y. Gen. Bus. Law §349

58. Plaintiffs Shady Grove Orthopedic Associates, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated, repeat and incorporate by reference the allegations set forth in paragraphs 1 through 57 above.

59. Ms. Galvez's claims, Shady Grove's claims and the claims of all proposed class members arise under

policies of automobile insurance issued by Allstate. Such policies are consumer insurance products, sold by Allstate to members of the consuming public at large.

60. An implied representation of fact contained in all the subject automobile insurance policies is that Allstate will address claims for first-party no-fault benefits in a manner consistent with the requirements of N.Y. Ins. Law §5106 and 11 NYCRR 65.15. By failing, on a widespread and systematic basis, to pay interest owed to members of the public under N.Y. Ins. Law §5106(a) and 11 NYCRR 65.15(h)(1), Allstate has betrayed that representation on a massive scale.

61. Through the conduct alleged herein, Allstate has engaged in practices that are deceptive in a material way. Those practices have not been isolated, but have been consumer-oriented, affecting the public at large.

62. Allstate's conduct, as alleged herein, is in violation of N.Y. Gen. Bus. Law §349.

63. Allstate's violations of N.Y. Gen. Bus. Law §349 have been willful and knowing, as evidenced by their frequency and scale.

64. As a direct result of Allstate's violations of N.Y. Gen. Bus. Law §349, Ms. Galvez and all others similarly situated have suffered and will suffer injury as heretofore alleged.

WHEREFORE, plaintiffs Shady Grove Orthopedic Associates, P.A. and Sonia E. Galvez, on behalf of themselves and all others similarly situated, respectfully request that this Court enter judgment as follows:

a. Entering an Order certifying the plaintiff class, appointing Ms. Galvez and/or Shady Grove as representatives of that class, and appointing Ms. Galvez's and Shady Grove's counsel to represent that class, all pursuant to Federal Rule of Civil Procedure 23;

b. Declaring the parties' rights, duties, status or other legal relations under the affected insurance contracts;

c. Awarding to Ms. Galvez, Shady Grove and all others similarly situated compensatory damages, in the form of interest owed under N.Y. Ins. Law §5106 and 11 NYCRR 65.15, for Allstate's breaches of its insurance contracts;

d. Awarding to Ms. Galvez, Shady Grove and all others similarly situated compensatory damages, in the form of interest owed under N.Y. Ins. Law §5106 and 11 NYCRR 65.15, for Allstate's bad faith breaches of its insurance contracts;

e. Awarding to Ms. Galvez, Shady Grove and all others similarly situated the interest owed to them under N.Y. Ins. Law §5106 and 11 NYCRR 65.15;

f. Awarding to Ms. Galvez, Shady Grove and all others similarly situated compensatory damages, in the form of interest owed to them under N.Y. Ins. Law §5106 and 11 NYCRR 65.15, for Allstate's violations of N.Y. Gen. Bus. Law §349;

g. Awarding to Ms. Galvez, Shady Grove and all others similarly situated treble damages under N.Y. Gen. Bus. Law §349(h);

h. Awarding to Ms. Galvez, Shady Grove and all others similarly situated their reasonable attorneys' fees under N.Y. Ins. Law §5106(a), 11 NYCRR 65.15(i)(1), N.Y. Gen. Bus. Law §349(h) or otherwise;

i. Awarding to Ms. Galvez, Shady Grove and all others similarly situated all costs of this action; and

j. Awarding such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

MURPHY SPADARO & LANDON

/s/

John S. Spadaro, No. JS3769
1011 Centre Road,
Suite 210
Wilmington, DE 19805
(302) 472-8100

Attorneys for plaintiffs Shady Grove Orthopedic Associates, P.A and Sonia E. Galvez.
(on behalf of themselves and all others similarly situated)

April 20, 2006

PETITIONER'S BRIEF

133

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(4)

No. 08-1008

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner

July 2009

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QUESTION PRESENTED

Does a state statute limiting the availability of class actions in state courts restrict a federal court's power to certify a class under Federal Rule of Civil Procedure 23 in an action where jurisdiction is based on diversity of citizenship?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court and in the court below are set forth in the caption. One other party, plaintiff Sonia E. Galvez, appeared in the district court but was not a party in the court of appeals and is not a party in this Court.

RULE 29.6 STATEMENT

Petitioner Shady Grove Orthopedic Associates, P.A., has no corporate parent, and no publicly held company owns ten percent or more of its stock.

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OPINIONS BELOW

The United States District Court for the Eastern District of New York dismissed petitioner's complaint in an opinion dated December 15, 2006, and reported at 466 F. Supp. 2d 467. The district court's opinion is reproduced in the appendix to the petition for a writ of certiorari at 19a-36a. The United States Court of Appeals for the Second Circuit affirmed on November 19, 2008, in an opinion reported at 549 F.3d 187 and reproduced in the appendix to the petition at 1a-18a.

JURISDICTION

The complaint in this action invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. Specifically, the complaint alleged jurisdiction under 28 U.S.C. § 1332(d)(2), as the action was filed as a class action under Federal Rule of Civil Procedure 23, and the named class representatives, Shady Grove Orthopedic Associates and Sonia E. Galvez (citizens of Maryland) were citizens of different states from the named defendant, Allstate Insurance Company (a citizen of Illinois). JA 7-8.

The district court's dismissal of the action for lack of subject-matter jurisdiction, based on its conclusion that a class could not be certified under New York state law, was a final order, and the court of appeals had jurisdiction over Shady Grove's timely appeal under 28 U.S.C. § 1291.

The court of appeals issued its decision on November 19, 2008. Shady Grove's timely petition for a

writ of certiorari was filed on February 6, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Supremacy Clause of the Constitution of the United States, Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Federal Rule of Civil Procedure 23 provides, in pertinent part:

> **Class Actions**
>
> (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

New York Civil Practice Law and Rules § 901 provides:

Prerequisites to a class action.

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Pertinent parts of the following statutes also involved in this case are reprinted in the appendix to this brief: the Rules Enabling Act, 28 U.S.C. § 2072; the Rules of Decision Act, 28 U.S.C. § 1652; the diversity jurisdiction statute, 28 U.S.C. § 1332; section 2 of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 28 U.S.C. § 1711 note; New York Civil Practice Law and Rules § 101; and New York Insurance Law § 5106(a).

STATEMENT OF THE CASE

New York's insurance laws require that automobile insurers provide first-party coverage to their insureds for losses and injuries arising out of their use of insured vehicles, including medical expenses of up to $50,000 per person. New York Ins. Law §§ 5103(a), 5102. The New York statutory scheme further provides that an insurer must pay such first-party benefits within 30 days of the submission of a properly documented claim and that overdue payments bear interest at a rate of 2% per month. *Id.* § 5106(a).

On May 30, 2005, Sonia E. Galvez (a citizen of Maryland) was injured in a collision while driving her automobile, which was registered in New York

and insured under a policy issued by respondent Allstate Insurance Company. She received medical treatment from petitioner Shady Grove Orthopedic Associates, P.A., a Maryland medical practice, and assigned to Shady Grove her rights to payment for that care under the Allstate policy. JA 12.

Through Shady Grove, Ms. Galvez submitted claims for payment of first-party benefits under her policy, but Allstate failed to make timely payments to Shady Grove and said that it had not received the claims. Allstate refused to pay the interest on its late payments called for by New York Insurance Law § 5106(a). JA 13.

On April 20, 2006, Ms. Galvez and Shady Grove filed this action in the United States District Court for the Eastern District of New York. Their complaint alleged that Allstate had a practice of routinely failing to pay first-party claims within the 30 days required by New York law, failing to pay the resulting interest, and claiming as an excuse that it had not received the insureds' proof of loss. JA 11-12. The complaint accordingly brought claims not just on behalf of Ms. Galvez and Shady Grove, but also on behalf of a proposed class of Allstate insureds who had similarly been denied the required interest payments, and it sought compensatory damages for the class in the amount of the interest wrongfully withheld. JA 13, 22.

The complaint invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(d)(2), which permits a district court to exercise jurisdiction over a class action in which one or more members of the plaintiff class is a citizen of a different state from one or more defendants, provided that the class includes

at least 100 members and the amount in controversy for the class as a whole exceeds $5 million. Because both Ms. Galvez and Shady Grove are citizens of Maryland and Allstate is a citizen of Illinois, the action met § 1332(d)(2)'s minimal diversity requirement. JA 7-8. The complaint alleged that the size of the class exceeded 1,000 members, JA 14, and the plaintiffs sought damages exceeding $5 million. Pet. App. 20a.

Allstate moved to dismiss the action on two grounds. First, it contended that Ms. Galvez was not a real party in interest and lacked standing because she had assigned her rights to Shady Grove. Second, Allstate contended that the action must be dismissed in its entirety because a New York statute, Civil Practice Law & Rules ("CPLR") § 901(b), provides that a class action may not be maintained to recover statutory penalties unless the statute providing the penalties specifically authorizes class proceedings. Allstate argued that CPLR 901(b) is applicable to diversity proceedings in federal courts, that the interest entitlement under New York's insurance law is a "penalty" within the meaning of section 901(b), and that, as a result, section 901(b) precludes maintenance of this case as a class action. Because Shady Grove's individual claim would not meet the $75,000 amount-in-controversy requirement for ordinary diversity jurisdiction (28 U.S.C. § 1332(a)), Allstate contended that the district court lacked subject-matter jurisdiction over the case.

The district court accepted both of Allstate's arguments.[1] With respect to the applicability of CPLR 901(b), the court stated that "[a]lthough certification in class actions brought under diversity jurisdiction is governed by the requirements set forth under Rule 23 of the Federal Rules of Civil Procedure, the right to bring a class action in New York, in both federal and state court, is subject to the limitation imposed by § 901(b) of the C.P.L.R." Pet. App. 27a. The court based this assertion principally on its view that failure to apply the statute would be "patently unfair." *Id.* (citation omitted). The court went on to conclude that the interest entitlement asserted by the complaint was a penalty because its purpose was "punitive," *id.* 32a, and it accordingly dismissed the complaint.

Shady Grove appealed, challenging the ruling that CPLR 901(b) applies in federal diversity actions and also arguing that a New York insurance regulation that expressly contemplates that a class action may be brought to enforce Insurance Law § 5106(a) provided the specific authorization for a class action that would be necessary were section 901(b) applicable in federal court.[2] The Second Circuit affirmed. According to the court, there was no "conflict" between Federal Rule of Civil Procedure 23's authori-

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[1] The court's holding that Ms. Galvez was no longer a real party in interest and lacked standing was not appealed and is not now at issue.

[2] Shady Grove also challenged the characterization of the interest requirement as a statutory penalty and requested that the issue be certified to the New York Court of Appeals, but the Second Circuit declined to consider these arguments because they were made in Shady Grove's reply brief. Pet. App. 6a n.3.

zation of class actions and section 901(b)'s prohibition, so the holding of *Hanna v. Plumer*, 380 U.S. 460 (1965), that validly promulgated federal rules trump state laws in diversity actions was inapplicable. Pet. App. 10a-13a. Invoking instead the general rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that diversity actions are governed by state "substantive" and federal "procedural" law, the court concluded that section 901(b) was substantive because its application was "outcome-affective," Pet. App. 9a, and, in the view of the court, it was intended to serve the substantive policy of limiting the deterrent effect of statutory penalties. *Id.* 14a. Moreover, the court asserted, failure to apply CPLR 901(b) in federal court would encourage "forum-shopping" in violation of what the court considered to be the primary objective of the *Erie* doctrine. Pet. App. 15a-16a.

Having found section 901(b) applicable, the court held that the New York regulation that recognized the availability of class actions to recover interest under Insurance Law § 5106(a) did not qualify as a *statutory* authorization for class actions. Pet. App. 17a-18a. Accordingly, the court held that Shady Grove's claims could not be pursued in a class action and that the district court had, therefore, correctly dismissed the action for want of subject-matter jurisdiction.

SUMMARY OF ARGUMENT

This case is controlled not by *Erie*, but by *Hanna v. Plumer*. *Hanna* holds that, under the Rules Enabling Act, 28 U.S.C. § 2072, a valid rule of civil procedure—that is, one that is reasonably understood as regulating matters of practice and procedure and that does not infringe or expand substantive rights—

must be applied by a federal court in a diversity action regardless of contrary state law.

In this case, Federal Rule of Civil Procedure 23 provides the federal courts with discretionary authority to certify a class action, while New York's CPLR 901(b), if applicable in the federal courts, would deny that discretion. Under such circumstances, the federal rule, if valid, prevails.

Allstate has not argued in this case that Rule 23 is not valid, but, in any event, such an argument would be unavailing. Rule 23 is a proper exercise of this Court's power under the Rules Enabling Act to regulate the practice and procedure of the federal courts, and its application would not enlarge or abridge substantive rights. From the standpoint of class members, certification of a class under Rule 23 would not enlarge their rights because it would not permit any class member to recover anything from Allstate that the member could not recover in an individual action. From the standpoint of Allstate, class certification would not abridge substantive rights, because CPLR 901(b) does not create a substantive right not to face a class action. Rather, it provides a *procedural* entitlement not to be subject to a class action seeking certain forms of relief *in the New York courts*. This limitation on the availability of class actions is not part of the definition of substantive rights of action under New York law; indeed, CPLR 901(b) is applied by the New York courts to rights of action under both state and federal law, precisely because it is only procedural.

Hanna and the decisions of this Court following it provide a sufficient basis for resolving this case without regard to the intricacies of *Erie*. But even if

application of *Erie* were necessary in this case, it, too, would foreclose application of CPLR 901(b) in federal court, because the statute is not "substantive" within the meaning of *Erie*. CPLR 901(b) does not define the rights and duties of the parties toward one another, regulate primary conduct, or deny any member of the prospective class the right to recover the damages sought in this case from Allstate. It governs only the mode of enforcing substantive rights, which is a matter properly considered procedural under *Erie*.

Moreover, the concerns about forum-shopping that animated *Erie* do not apply here. Those concerns have never been aimed at forum choices that are driven by a preference for superior rules of federal practice and procedure. And critically, in enacting the Class Action Fairness Act ("CAFA"), Congress has recently expressed a policy that explicitly authorizes and endorses the choice of a federal forum precisely to ensure the application of federal class certification standards under Rule 23. Applying state class action rules in an action brought in federal court under CAFA would run counter to that congressional policy.

The application of state law here would also have other unfortunate consequences, including infringement of the inherent power of federal courts to govern their own procedures and disruption of the uniformity of federal practice that is a principal objective of the Rules Enabling Act and the Federal Rules of Civil Procedure. A decision that state law applies, moreover, could not logically be limited to state laws that restrict the availability of class actions, but would also necessarily mean that more expansive

state class action procedures would also be imported into federal courts. The combination of such a result with CAFA's great expansion of federal jurisdiction over class actions based on state rights of action would mean that the federal courts would plunge heavily into the business of certifying classes under state procedural standards—which is exactly the opposite of Congress's purpose in enacting CAFA.

ARGUMENT

I. Federal Rule of Civil Procedure 23 Is a Valid Exercise of the Court's Rulemaking Power Under the Rules Enabling Act, and, Under *Hanna v. Plumer*, the Rule Forecloses Application of CPLR 901(b) in a Federal Diversity Action.

A. Federal Courts Apply Federal Procedural Rules in Diversity and Federal Question Cases Alike.

Since this Court's decision in *Erie*, generations of first-year law students have learned that "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). But the Court's decision in *Hanna v. Plumer*, 380 U.S. 460, added that where a federal rule is on point, the question whether state law governs an issue in a diversity case is not, properly speaking, an "*Erie*" question at all, nor one implicating the Rules of Decision Act, 28 U.S.C. § 1652, which provides the analytical basis for the *Erie* doctrine. Rather, as Professor Ely has explained, "*Hanna*'s main point ... was that when the application of a Federal Rule is at issue, the Rules Enabling Act—and not the Rules of Decision

Act as construed by *Erie R.R. Co. v. Tompkins* and other cases—should determine whether federal or state law is to be applied." John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 718 (1974).

In the first decades after it decided *Erie*, this Court struggled to define the line between substance and procedure, and the Court has frankly acknowledged that "classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Gasperini*, 518 U.S. at 427. As Justice Frankfurter wrote in *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945):

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems.

See also id. at 115 ("The words 'substantive' and 'procedural' or 'remedial' are not talismanic. Merely calling a legal question by one or the other does not resolve it otherwise than as a purely authoritarian performance.") (Rutledge, J., dissenting).

In its landmark decision in *Hanna*, the Court simplified matters greatly by recognizing that valid rules of procedure promulgated under the Rules Enabling Act, 28 U.S.C. § 2072, must be applied by federal courts sitting in diversity regardless of contrary state law, and regardless of whether that contrary state law might otherwise be characterized as procedural or substantive under *Erie*. As *Hanna* explained:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471.

The Court made the point just as definitively in *Gasperini*:

> Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic. It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.

518 U.S. at 428 n.7 (citing *Hanna*, 380 U.S. at 469-74; *Burlington N.R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)).

Underlying *Hanna*'s command that federal courts apply federal procedural rules is the Supremacy Clause, which provides that valid federal laws such as the Rules Enabling Act and the procedural rules promulgated under its authority, where they apply, displace state standards that would yield a different result. *See Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.4 (1988). Under *Hanna*, applicable federal rules preclude federal courts from applying state law not only when the conflict between them is such that

they explicitly command opposite resolutions of precisely the same question, but also, and more generally, when the federal rule "is 'sufficiently broad' to cause a 'direct collision' with the state law *or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law.*" *Burlington Northern*, 480 U.S. at 4-5 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 640, 749-50 & n. 9 (1980), and *Hanna*, 380 U.S. at 471-72) (emphasis added).[3] Thus, for example, if a federal procedural rule grants a district court discretion about how to resolve a particular issue, while state law would impose a categorical rule, the federal rule must govern. *See Ricoh*, 487 U.S. at 29-31; *Burlington Northern*, 480 U.S. at 7.

Hanna's direction that federal courts apply the federal rules authorized by the Rules Enabling Act is limited by the terms of the Act, which requires that the rules must govern "practice and procedure," 28 U.S.C. § 2072(a), and that they "shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). The first requirement is satisfied if a rule is an exercise of the court's "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna*, 380 U.S. at 472.[4] The second limitation is honored if the rule

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[3] *See also Ricoh*, 487 U.S. at 26 n.4 (holding that federal law controls if it is "sufficiently broad to cover the point in dispute").

[4] The Court's opinion in *Hanna* makes clear that a rule may satisfy this test even if in the absence of a governing federal rule the Court might deem the matter "substantive" under *Erie* and apply state law. *See id.* at 469-73.

does not alter "the rules of decision by which th[e] court will adjudicate [a party's] rights," *id.* at 465 (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946)), even though the federal rule may substantially "alte[r] the mode of enforcing state-created rights," *id.* at 473, and thus "incidentally affect litigants' substantive rights." *Burlington Northern*, 479 U.S. at 5. Ultimately, "[t]he test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941).

B. The Federal Rule and the New York Rule Are Incompatible.

1. Rule 23 Specifies When Federal Courts May Certify Class Actions.

Federal Rule of Civil Procedure 23 "deals comprehensively with class actions." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 (1978). The rule defines the circumstances under which a federal court may certify a class action and sets forth factors the court must consider in determining whether class certification is appropriate. Rule 23(a) begins by establishing threshold requirements that all federal class actions must satisfy: numerosity of the class, commonality and typicality of claims, and adequacy of representation. Rule 23(b) then sets forth the types of cases in which federal courts are authorized to certify a class.

Under Rule 23(b)'s subdivisions, the type of relief sought by the class is a critical consideration in determining the action's amenability to class treat-

ment. Rule 23(b)(1) provides for class actions when the form of relief sought by class members is such that individual adjudications would threaten to impose inconsistent obligations on defendants (Rule 23(b)(1)(A)) or to impair the ability of other class members to obtain relief (Rule 23(b)(1)(B)).[5] Rule 23(b)(2) authorizes certification when an action seeks declaratory or injunctive relief on behalf of the class as a whole. Finally, Rule 23(b)(3), the subdivision applicable here, grants a district court discretion to certify a class in a case seeking monetary relief if the class satisfies the threshold requirements of Rule 23(a) and the court determines that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1995).[6]

The Rule 23(b)(3) criteria are "[f]ramed for situations in which 'class action treatment is not as clearly called for'" as in suits seeking injunctive and similar forms of relief, but where a "class suit 'may

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[5] A classic example of the (b)(1)(B) situation is when plaintiffs seek relief against a "limited fund." *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999).

[6] Because the nature of the relief sought in (b)(1) and (b)(2) class actions involves greater interests in having only a single adjudication and a correspondingly decreased potential interest on the part of individual plaintiffs in controlling their own litigation, (b)(1) and (b)(2) classes are "mandatory," in contrast to (b)(3) classes, in which class members must be permitted to opt out of the class. *See Ortiz*, 527 U.S. at 833 n.13.

nevertheless be convenient and desirable.'" *Amchem*, 521 U.S. at 615 (quoting 1966 Adv. Comm. Notes to Rule 23). Rule 23(b)(3) seeks to "cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Id.* (quoting 1966 Adv. Comm. Notes). The rule directs courts determining whether a class action is the "superior" method for adjudicating a case to consider, among other things, the following:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Both this Court and the federal courts of appeals have recognized the broad discretion that Rule 23 grants district courts to determine whether class litigation is appropriate. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[M]ost issues arising under Rule 23 ... [are] committed in the first instance to the discretion of the district court."); *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998) ("The Federal Rules of Civil Procedure provide the federal district courts with

'broad discretion' to determine whether certification of a class-action lawsuit is appropriate."). Federal courts applying the discretionary Rule 23 criteria have found that class actions seeking statutory penalties for a common course of unlawful conduct may be particularly appropriate for class treatment because of the predominance of common questions and the reduced significance in such cases of individualized damages assessments. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d. 832, 836 (7th Cir. 1999). Indeed, class certification was recently granted by another district court in a case identical to this one. *Bulmash v. Travelers Indem. Co.*, 257 F.R.D. 84, 87-92 (D. Md. 2009) (certifying class in action to recover statutory interest for overdue no-fault insurance benefits under Maryland statute).

2. CPLR 901 Regulates Class Actions Differently Than Does Rule 23.

New York's CPLR 901 is at odds with Rule 23 because it addresses the same subject matter but imposes inconsistent standards. Section 901 is similar to Rule 23 in that it sets forth the criteria under which the New York courts may certify a class action. Indeed, section 901's title echoes that of Rule 23(a) in stating that the section defines the "prerequisites" to maintenance of a class action. However, section 901 defines those prerequisites differently than does Rule 23. First, in its subsection (a), section 901 provides for only one type of class action, similar to that provided for in Rule 23(b)(3), requiring that common questions "predominate" and that the class action be the "superior" method for adjudicating the case; unlike Rule 23, section 901 does not provide for certification of class actions seeking injunctive or de-

claratory relief or limited fund class actions without satisfaction of the predominance and superiority tests.[7] Second, section 901(b) sets forth a categorical rule depriving New York courts of the authority to certify class actions seeking statutory penalties or "minimum measure[s] of recovery" unless the statute creating the penalty "specifically authorizes the recovery thereof in a class action."

When a plaintiff seeks to certify a federal class action seeking the recovery of statutory penalties, Rule 23 on its face is "sufficiently broad to cover the point in dispute." *Ricoh*, 487 U.S. at 26 n.4. Such a putative class seeking monetary relief falls within the scope of Rule 23(b)(3), which sets forth the criteria governing the district court's discretionary decision whether to certify the class. That decision turns on the questions of predominance of common issues and superiority of the class mechanism for resolving the case. Rule 901(b), by contrast, takes a markedly different approach, denying New York courts the discretion to certify a class that lies at the heart of the federal rule. Under *Hanna* and the precedents following it, such incompatibility between a controlling federal procedural rule promulgated under the Rules Enabling Act and a state law "leaves no room for the operation of [state] law" in the federal courts. *Burlington Northern*, 480 U.S. at 5.

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[7] As a result, New York courts have sometimes declined to certify classes seeking injunctive relief in circumstances when application of Rule 23(b)(2) would likely result in certification. *See, e.g., Legal Aid Soc'y v. New York City Police Dept.*, 713 N.Y.S.2d 3 (App. Div.), *app. dism'd*, 745 N.E.2d 389 (N.Y. 2000).

3. Federal Courts Must Apply Rule 23's Discretionary Approach Rather Than CPLR 901(b)'s Categorical Rule.

This Court's decisions in *Burlington Northern* and *Ricoh* teach that the discrepancy between the federal and state rules at issue here is precisely the type of "conflict" that calls, under *Hanna*, for application of the federal rule. *Burlington* involved an Alabama statute providing for a mandatory 10% penalty when a money judgment that had been stayed pending appeal was affirmed by an appellate court. The question before this Court was whether this state law applied to appeals in diversity cases in the federal courts. The Court held that because Federal Rule of Appellate Procedure 38 addressed the same general issue—damages for unsuccessful appeals—but provided that such damages were available on a *discretionary* basis in *frivolous* appeals, the state standard conflicted with the federal rule; thus, under *Hanna*, the applicable federal rule excluded operation of the state law. *Id.* at 4-7. The Court explained:

> Rule 38 affords a court of appeals plenary discretion to assess "just damages" in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment. Thus, the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies

> the statute's field of operation so as to preclude its application in federal diversity actions.

Id. at 7.

Similarly, in *Ricoh*, the Court considered the possible application to venue determinations in federal diversity actions of principles of Alabama law categorically disfavoring contractual choice-of-forum clauses. By contrast, federal decisional law under the change-of-venue statute, 28 U.S.C. § 1404(a), which provides for broad discretion to transfer cases "for the convenience of parties and witnesses, in the interest of justice," *id.*, recognized that a contractual forum selection clause "is a significant factor that figures centrally in the district court's calculus" under § 1404(a). *Ricoh*, 487 U.S. at 29. As in *Burlington Northern*, the Court held that state law was inapplicable because the federal procedural standard was "sufficiently broad to control the issue before the court" and, within its "field of operation," its "discretionary mode" conflicted with the state's "categorical policy." *Id.* at 29, 30.

Significantly, the Court recognized that the federal standard precluded operation of state law even though the state and federal standards were "not perfectly coextensive." *Id.* at 30. What was dispositive was that the federal standard called for a "flexible and multifaceted analysis," while the state standard "focus[ed] on a single concern or a subset of the factors" that were relevant under the federal rule; thus, application of the state policy would "defeat th[e] command" of federal law. *Id.* at 31

Just as in *Burlington* and *Ricoh*, the federal standard at issue here "controls the issue" and "occupies the field" of operation of the competing state law.

And just as in *Burlington* and *Ricoh*, the federal rule's "discretionary mode of operation" does not allow for the "mandatory" or "categorical" approach of the state statute, which would seize on one of the many factors relevant to class certification under the federal rule—the type of relief sought—and make it dispositive. As in *Burlington* and *Ricoh*, the controlling federal rule "leaves no room for the operation" of the entirely different approach to the issue that state law would, if applicable, require. Thus, the principles of *Hanna v. Plumer* and the authority of the Rules Enabling Act require application of normal Rule 23 standards rather than the conflicting approach of CPLR 901(b).

4. The Lower Court's "Direct Conflict" Standard Contradicts This Court's Decisions.

The Second Circuit held that there was no "direct conflict" between Rule 23 and CPLR 901(b) because "Rule 23 does not make reference to whether any particular state statutory cause of action can be brought as a class action or otherwise evidence an intent to occupy the field on this question." Pet. App. 12a. But CPLR 901(b) also does not address whether "any particular state statutory cause of action can be brought as a class action"; it refers not to particular causes of action, but generically to forms of relief sought by the class, and it does not even purport to limit itself to *state-law* statutory penalties. Rule 23 emphatically *does* address the manner in which the form of relief sought affects the class certification determination by providing different standards for class actions seeking injunctive and declaratory relief (Rule 23(b)(2)), for actions seeking forms of relief

that might impose inconsistent obligations on defendants or preclude plaintiffs proceeding separately from obtaining relief (Rule 23(b)(1)), and for actions seeking other forms of relief, including monetary relief (Rule 23(b)(3)). In short, Rule 23 occupies exactly the field in which CPLR 901(b) operates.

More fundamentally, the Second Circuit's decision misconceived the meaning of "conflict" and failed to grasp the relevance to this case of *Burlington Northern* and *Ricoh*. *Ricoh*, in particular, shows that the kind of exact congruence between the subjects of federal and state rules that the Second Circuit demanded is not necessary to a determination that the federal rule must prevail under *Hanna*. As *Ricoh* emphasized, federal and state standards may conflict even if they are not "perfectly coextensive and equally applicable to the issue at hand," 487 U.S. at 26 n.4.[8] Here, the federal rule grants the district courts discretion to certify a class upon a determination that Rule 23(a)'s criteria are satisfied, that common issues predominate, and that class resolution is the superior way of deciding the case. No type of relief is categorically excluded from the scope of the rule, which is applicable "across the entire range of legal questions." *Snyder v. Harris*, 394 U.S. 332, 341 (1969). Indeed, courts construing the rule have specifically applied it to actions seeking statutory penalties. *See* cases cited *supra*, at 19.

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[8] Specifically, in *Ricoh*, the federal statute did not by its terms address choice-of-forum clauses, but merely set forth a broad discretionary standard that was sufficient to encompass consideration of such clauses.

More broadly, this Court has emphasized that absent a *congressional* decision to preclude class actions, Rule 23 authorizes class treatment of any federal action that satisfies the rule's criteria:

> Federal Rule Civ. Proc. 1 ... provides that the Rules "govern the procedure in the United States district courts in *all* suits of a civil nature." (Emphasis added.) ... In the absence of a direct expression by Congress of its intent to depart from the usual course of trying "all suits of a civil nature" under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court ....

Califano, 442 U.S. at 700. That holding is more than enough to establish that the federal rule is "sufficiently broad to cover the point in dispute," *Ricoh*, 487 U.S. at 26 n.4, and that the state law's approach of categorically excluding cases seeking certain types of relief from class treatment is incompatible with the federal rule's discretionary approach.

C. Federal Rule of Civil Procedure 23 Is a Valid Exercise of Authority Under the Rules Enabling Act.

1. Rule 23 Is Reasonably Classified as Procedural.

Under *Hanna v. Plumer*, Rule 23 must be applied in diversity actions notwithstanding variant state law "if it represents a valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act, 28 U.S.C. § 2072." *Burlington*, 480 U.S. at 5. Allstate has not argued in this litigation that Rule 23 is outside the scope of the Rules

Enabling Act—and with good reason.[9] This Court has emphasized that "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect ... give the Rules presumptive validity under both the constitutional and statutory constraints." *Id.* at 6; *see also Hanna*, 380 U.S. at 471; *Sibbach*, 312 U.S. at 14-15. And even without the benefit of this presumption, Rule 23's terms easily satisfy the requirement that they be "rationally capable of classification" as procedural. *Hanna*, 380 U.S. at 472.[10] Thus, if Rule 23's validity were challenged in this case, it would readily pass muster.

At bottom, a procedural rule is "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 724. That exactly describes the purpose of Rule 23 in general and of Rule 23(b)(3) in particular: The rule is designed to select a "method of handling the litigious situation" that has the greatest possible "practical advantages," including "economies of time, effort, and expense," "uniformity of decision," and "procedural fairness." 1966 Adv. Comm. Notes to Rule 23, subdivision (b)(3). The promulgation of a rule serving such purposes fits comfortably within the Rules

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[9] *Cf. Sibbach*, 312 U.S. at 11 (noting petitioner's admission that challenged rules were procedural).

[10] *See also Burlington Northern*, 480 U.S. at 8 (A Federal Rule of Civil Procedure is valid if it "can reasonably be classified as procedural.").

Enabling Act's "authorization of a comprehensive system of court rules" aimed at ensuring "that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth." *Sibbach*, 312 U.S. at 14.

Not surprisingly, then, this Court has repeatedly recognized the procedural nature of Rule 23 and the class-action mechanism it creates. As the Court explained in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880, 881 (1984), "[t]he class-action device was intended to establish a procedure for the adjudication of common questions of law or fact," and "Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions."

The essentially procedural nature of the class action stems from the fundamental principle that although it allows aggregation of claims and their pursuit on behalf of a class by a named representative, it does not provide any class member with any right to recovery that he or she does not, as a matter of substantive law, possess individually. *See Califano v. Yamasaki*, 442 U.S. at 701 ("Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding."). Thus, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation

of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).[11]

The Court's recognition of the procedural nature of Rule 23's authorization of class actions is evident in its repeated references to the class action as a "device" or "mechanism."[12] The Court has, moreover, emphasized that the justifications for the rule lie in essentially procedural policy choices based on considerations of fairness, efficiency, and appropriate management of the federal courts' caseload. Soon after Rule 23 took its present general shape in the 1966 amendments to the Federal Rules of Civil Procedure, the Court recognized that its underlying rationale was that "the class action device serves a useful function across the entire range of legal questions." *Snyder v. Harris*, 394 U.S. at 341.

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[11] *See also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) (describing assertion of "the right to represent a class" as "a procedural claim.").

[12] *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006) ("device"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 87 (2006) ("device"); *Gratz v. Bollinger*, 539 U.S. 244, 267-68 & n.17 (2003) ("device" and "mechanism"); *Amchem*, 521 U.S. at 617 ("device"); *Cooper*, 467 U.S. at 880, 881 ("device" and "mechanism"); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 n.5 (1983) ("mechanism"); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) ("device"); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15 (1981) ("device"); *Roper*, 445 U.S. at 331, 339 ("device" and "mechanism"); *Geraghty*, 445 U.S. 388, 403 ("device"); *Califano v. Yamasaki*, 442 U.S. at 700, 701 ("device"); *Johnson v. Ry. Exp. Agency*, 421 U.S. 454, 475 (1975) ("mechanism"); *Ross v. Bernhard*, 396 U.S. 531, 540-41 (1970) ("device"); *Snyder v. Harris*, 394 U.S. at 338 ("device"); *Flast v. Cohen*, 392 U.S. 83, 94 (1968) ("device").

In particular, the Court has repeatedly recognized that "efficiency and economy of litigation ... is a principal purpose of the [class action] procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). Those procedural benefits flow from consolidated litigation in cases where the criteria of subdivision (b) of the rule are satisfied:

> Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." ... For in such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."

Gen. Tel. Co. v. Falcon, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. at 701).

The Court elaborated on these justifications for Rule 23 in *United States Parole Commission v. Geraghty*, 445 U.S. at 402-03:

> The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.

In short, Rule 23 creates a procedural device to serve procedural ends. In so doing, it follows in a long tradition of the use of class litigation by federal

courts. Class action procedures were developed by the federal courts sitting in equity to allow adjudication of rights common to groups of litigants too numerous for joinder, and the principles developed in such cases were later incorporated into the Federal Equity Rules. *See Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363-64 (1921). This Court long ago recognized that the Equity Rules' provision for class actions was a valid exercise of the federal courts' inherent (as well as statutorily conferred) power to regulate their own procedures:

> Equity Rule 38, 28 U.S.C.A. following section 723, providing that in a class suit "one or more (of a class) may sue or defend for the whole," was adopted in the exercise of the authority conferred on this Court by Rev. St. § 913, 28 U.S.C.A. § 723, and of its own inherent power to regulate by rules "the ... modes of proceeding in suits of equity." Their purpose was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts ....

Christopher v. Brusselback, 302 U.S. 500, 505 (1938).

With the merger of law and equity authorized by the original Rules Enabling Act[13] and effected by the adoption of the Federal Rules of Civil Procedure in 1937, class action procedures "applie[d] to all actions whether formerly denominated legal or equitable." 1937 Adv. Comm. Note to Fed. R. Civ. P. 23, subdivi-

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[13] Act of June 19, 1934, c. 651, § 2, 48 Stat. 1064 ("The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both ....").

sion (a). Since that time, the criteria for certification of classes and the procedures required in connection with the certification decision, notice to class members, appointment and compensation of counsel, and settlement of class actions have evolved in successive amendments of the rule, most notably in 1966 and 2003, but the rule remains fundamentally what it has always been: an exercise of the power to regulate "practice and procedure ... for cases in the United States district courts." 28 U.S.C. § 2072(a).

2. Applying Rule 23 in This Case Would Not Abridge, Enlarge, or Modify Substantive Rights.

a. Class Treatment Does Not Enlarge Class Members' Substantive Rights.

The application of Rule 23 to permit a class action in this case would not violate the Rules Enabling Act's command that rules not "abridge, enlarge or modify substantive rights," 28 U.S.C. § 2072(b), because class certification would "affect[t] only the process of enforcing litigants' rights and not the rights themselves." *Burlington Northern*, 480 U.S. at 8. Class certification would permit claims possessed by each class member to be pursued in an aggregated action by a representative plaintiff, but would only permit recovery to the extent that class members had valid claims that would support an individual action against Allstate for the interest provided under New York law. A class action allows "various individual claims" to be adjudicated "in a single proceeding." *Califano*, 442 U.S. at 701. It does "not operate to abridge, enlarge or modify the rules of decision by which th[e] court will adjudicate [the parties']

rights." *Hanna*, 380 U.S. at 465 (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. at 445-46).

The absence of any impermissible enlargement or modification of class members' substantive rights in this situation is illustrated by the Court's decision in *American Pipe*. There, the Court specifically rejected the argument that interpreting Rule 23 to toll an applicable statute of limitations for all class members upon the filing of a class action complaint would violate the Rules Enabling Act by abridging, enlarging, or modifying substantive rights. 414 U.S. at 556-59.[14] The Court held that substantive rights would not be altered so long as each class member could have brought a non-time-barred claim as of the date of the class complaint. *See id.* at 554-55. The same is true here: Class adjudication will not lead to a recovery by any class member who did not have a valid claim for relief under New York law as of the filing of the complaint, and, therefore, it does not change the substantive rights of either the plaintiffs or Allstate.[15]

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[14] The statute of limitations at issue in *American Pipe* was prescribed by federal rather than state law, *see* 414 U.S. at 767-68, but the Rules Enabling Act's prohibition on abridgment, enlargement, or modification of substantive rights applies equally to substantive rights created by state and federal law.

[15] In light of *American Pipe*, the Second Circuit's statement that section 901(b) is "analogous to a statute of limitations, which is substantive for *Erie* purposes" (Pet. App. 12a) is, even if accurate as far as it goes, not sufficient to establish that section 901(b) creates "substantive rights" for *Hanna*/Rules Enabling Act purposes. Indeed, in holding that the application of Rule 23 to toll a statute of limitations did not alter substantive rights, *American Pipe* necessarily concluded that any rights created by statutes of limitations do *not* necessarily trump the operation of applicable federal rules.

b. CPLR 901(b) Does Not Create a Substantive Right Not to Face a Class Action.

Nor can CPLR 901(b) be said to confer on Allstate a "substantive right" not to be subject to a class action seeking statutory penalties. This Court has more than once characterized the "right" to maintain a class action as a procedural rather than substantive right. *Roper*, 445 U.S. at 332; *Geraghty*, 444 U.S. at 402. Any purported "right" *not* to be subject to a class action is, logically, equally procedural. And the Rules Enabling Act does not prohibit alteration of procedural rights, however "important" they may be. *Sibbach*, 312 U.S. at 13-14. Indeed, this Court has long recognized that the Federal Rules of Civil Procedure legitimately "altered and abolished old rights ... and created new ones *in connection with the conduct of litigation*." *Id.* at 14 (emphasis added).

Moreover, to the extent that the authorization for class actions is, as this Court has repeatedly held, a matter of procedure, and hence within the scope of the Rules Enabling Act, *see supra* at 25-31., it would be anomalous to hold that a state law that would purport to regulate the same matter establishes "substantive" rights that trump the federal rule. Properly understood, the Enabling Act's authorization of the issuance of rules of "practice and procedure" and its caveat that such rules may not change substantive rights are two sides of the same coin. *See Sibbach*, 312 U.S. at 10 (noting that the Rules Enabling Act's "proviso" that rules may not alter substantive rights exists to "emphasize" that the Act is "restricted in its operation to matters of pleading and court practice and procedure").

The notion that CPLR 901(b) creates "substantive" rights is further undermined by the structure of the New York procedural laws in which it is embedded. New York's Civil Practice Law and Rules, of which section 901(b) is a part, are introduced by CPLR 101, which provides that "[t]he civil practice law and rules shall govern the *procedure* in civil judicial proceedings *in all courts of the state* and before all judges, except where the procedure is regulated by inconsistent statute" (emphasis added). By its own express terms, then, the statute regulates procedure, and it does not purport to do so beyond the state's own courts. Labels may not be dispositive in this area, but CPLR 101's definition of the scope of the Civil Practice Law and Rules is no mere label, and a statute that limits itself to governing "procedure" in a particular court system is an unlikely source of "substantive rights" that must be respected outside that system.[16]

Moreover, CPLR 901(b) is not a stand-alone statute, but a subsection in a provision that sets forth the "prerequisites to a class action" and that, like Rule 23, establishes criteria for the certification of class actions that are applicable to actions of any and all types. Just as Rule 23 is itself procedural, CPLR 901, its New York counterpart, is most reasonably characterized as procedural. Surely, for example, CPLR 901 could not be said to create a "substantive right" enforceable in federal court to be exempt from class treatment in a matter that does not satisfy the

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[16] *Cf. American Pipe*, 414 U.S. at 558 n.29 (placing weight on legislative history characterizing a statute of limitations as "procedural").

criteria of CPLR 901(a) but does meet the standards of, say, Federal Rule of Civil Procedure 23(b)(2). *See supra* n.7. Nor would it be plausible to assert that CPLR 901(a) created a "substantive right" to *maintain* a class action in federal court if New York state courts interpreted section 901(a) to allow class certification in circumstances where federal courts construing Rule 23 did not allow certification. That section 901(b) modifies section 901(a)'s criteria by specifying that New York courts may not certify actions seeking particular forms of relief does not transform a rule governing procedure into one of substance.

c. CPLR 901(b) Is Not Part of the Definition of Substantive State-Law Rights of Action.

Despite section 901(b)'s location as a subsection of a procedural rule defining criteria for certification of class actions, which itself is part of a broader set of laws and rules governing procedure in the New York courts, Allstate has argued that section 901(b) is "substantive" because it is somehow part and parcel of the definition of state-law rights of action—that it is "a *state*-law limitation on a *state*-law cause of action." Brief in Opp. 5; *see also id.* at 7-8, 9. The notion that New York's rule against certification of classes seeking statutory penalties is an integral part of the substantive definition of state-law rights of action, however, is contradicted by the text of section 901(b) itself and by the New York state courts' interpretation of it.

To begin with, nothing in section 901(b) suggests that it is limited to rights of action based on New York state law, as opposed to federal law or the law of other states. On its face, section 901(b) applies to

actions seeking penalties under *any* statute. Because New York has no power to determine the substantive rights of litigants under federal statutes, or statutes of other states, the facial applicability of section 901(b) to actions brought under such statutes is incompatible with the notion that it defines substantive rights.

Moreover, in keeping with its language, the New York courts have repeatedly applied section 901(b) to federal rights of actions brought in the courts of the state, based on the only permissible rationale for that result: that section 901(b) is a procedural rule. In *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (App. Div. 2005), the Appellate Division held that section 901(b) precluded a class action under the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*, reasoning that "although the TCPA creates a minimum measure of recovery and imposes a penalty for willful or knowing violations, and the plaintiff is seeking the same, the TCPA does not specifically authorize a class action [as required under section 901(b)]." *Id.* at 798. The court specifically rejected the argument that "CPLR 901(b) is substantive in nature and, therefore, should not be applied" to a federal cause of action. *Id.* Rather, the court held that the application of this "for[m] of local practice" was not incompatible with the goals of the TCPA, *id.* at 800, and thus was permissible in light of this Court's recognition that "States may establish the *rules of procedure* governing litigation in their own courts" as long as they do not "defeat" federal rights. *Id.* at 799 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)) (emphasis added).

The Appellate Division has likewise looked to section 901(b) in determining whether to allow class actions to proceed on other purely federal claims. In *Vickers v. Home Federal Savings & Loan Association*, 390 N.Y.S.2d 747 (App. Div. 1977), the court allowed a class action to proceed under the federal Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, on the ground that the Act's provisions expressly authorize class actions as required under section 901(b). 390 N.Y.S.2d at 748. Similarly, the court in *Felder v. Foster*, 421 N.Y.S.2d 469 (App. Div. 1979), *app. dism'd*, 49 N.Y.2d 800 (1980), found that a class action under 42 U.S.C. § 1983 passed muster under CPLR 901(b), precisely because the plaintiffs' § 1983 remedies were consistent with section 901(b)'s procedural requirements. *Felder*, 421 N.Y.S.2d at 471 ("CPLR 901(b) does not preclude a class action where plaintiffs seek punitive damages under section 1983 . . . since such damages are not a 'penalty' or 'minimum measure of recovery created or imposed by statute.'") (citations omitted).

A statute that applies to class actions in *federal* cases brought in state court because the state deems it a rule of procedure or a "local form of practice" cannot simultaneously apply in the federal court on the theory that it establishes "substantive rights." A rule that the state courts themselves deem procedural and defend on the basis of the state's power to regulate its "own courts," *Rudgayzer*, 799 N.Y.S.2d at 799, does not magically become "substantive" when an action is brought in another court system with its own forms of practice.

d. CPLR 901(b) Serves Procedural Rather Than Substantive Interests.

CPLR 901(b) is not analogous to a damages cap or a substantive limit on the amount of a defendant's liability for a statutory violation.[17] It does not restrict the number of times a defendant may be sued for penalties, the number of plaintiffs who may sue, or the amount of penalties each plaintiff may recover. It addresses only whether plaintiffs may seek such recoveries through a class action or through individual actions or other means of aggregation (such as joinder or intervention).

The Second Circuit, citing statements in the New York Court of Appeals' decision in *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007), nonetheless concluded that section 901(b) reflected a substantive policy choice to "offset the deterrent effect of statutory penalties by eliminating the class action device as a means of enforcement of those penalties." Pet. App. 14a. *Sperry*'s description of the purpose of section 901(b) and the legislative history on which *Sperry* relied, however, paint a very different picture.

As set forth in *Sperry*, the stated rationale for the New York legislature's inclusion of section 901(b) when it enacted section 901 to govern class-action procedures in 1975 was as follows:

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[17] In this respect, this case differs greatly from *Gasperini*, in which one aspect of the state law involved—the standard for determining whether damages were excessive—was deemed by the Court to be substantive because it provided the measure of the plaintiff's right to recover in much the same way that a cap on damages would. *See Gasperini*, 518 U.S. at 429-30.

> "The bill ... precludes a class action based on a statute creating or imposing a penalty or minimum measure of recovery unless the specific statute allows for a class action. These penalties or 'minimum damages' are provided as a means of encouraging suits where the amounts involved might otherwise be too small. Where a class action is brought, this additional encouragement is not necessary. A statutory class action for actual damages would still be permissible."

Sperry, 8 N.Y.3d at 211 (quoting Sponsor's Mem., Bill Jacket, L. 1975, ch. 207). Based on its review of the terms of the law and the history of its enactment, the *Sperry* court went on to summarize its own view of the purpose of section 901(b):

> It is evident that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status. This makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred.

Id. at 213.

To say that class actions may not be "necessary" in a given set of circumstances is far different from saying a defendant has a "substantive right" not to

face them in those circumstances. Notably absent from the New York court's description of the purposes served by section 901(b) is any reference to a desire on the part of the state (as opposed to some of those who lobbied for the legislation) to limit the deterrent effect of statutory penalties, to shield defendants from liability, or to place a cap on recoveries.

Rather, the court's account of section 901(b)'s evident purpose reflects a balancing of the same procedural considerations going to the utility and importance of the class mechanism that underlie Rule 23. *See supra* at 26-29. To be sure, the New York rule reflects a different judgment about *when* the interest in facilitating aggregation of small claims justifies use of the class mechanism than the judgment incorporated in Rule 23, which includes no similar limitation on the types of claims eligible for class certification. But the very essence of a state procedural rule that must bow to a contrary federal rule is that it merely reflects a different judgment about how best to achieve procedural objectives. By contrast, "[t]he most helpful way ... of defining a substantive rule—or more particularly a substantive right, which is what the [Rules Enabling] Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 725. Thus, CPLR 901(b) is not the source of "substantive rights" that must be given effect under *Hanna* and the Rules Enabling Act. Rather, it "represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation." *Id.* at 722.

II. *Erie*, Even If Applicable, Would Not Require a Federal Court Sitting in Diversity to Follow CPLR 901(b).

Only if there is no federal rule on point need the Court grapple with the question whether state law is procedural or substantive in *Erie*'s terms. Even then, *Hanna* teaches, the question must be addressed with the recognition that no one factor in isolation (such as whether the rule would be "outcome determinative" or stimulate "forum-shopping") is dispositive. *See Hanna*, 380 U.S. at 466-69. Here, even if the Court must resort to *Erie* analysis, that analysis, too, forecloses application of the state-law rule.

A. *Erie* Does Not Require Federal Courts to Follow State Rules of Practice.

Absent an applicable federal rule, state law applies in diversity actions only to the extent that it is substantive rather than procedural. *Gasperini*, 518 U.S. at 427; *see also Hanna*, 380 U.S. at 466-72. The Rules of Decision Act, on which the *Erie* doctrine rests, provides only that state law provides the "rules of decision ... in cases where they apply," 28 U.S.C. § 1652—a phrase that this Court has held refers to the decision of a case on the merits, not to matters of practice, procedure, or case management. *See Sibbach*, 312 U.S. at 9-10.

The *Erie* doctrine must be applied with recognition that "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525, 537 (1952). When, as a result of diversity jurisdiction, "'a [state-created] right is enforceable in a federal as well as in a State court, the

forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic.'" *Hanna*, 380 U.S. at 474 (quoting *Guar. Trust Co. v. York*, 326 U.S. at 108). Indeed, absent congressional authorization, the states lack the power to dictate the procedures used by a federal court. *See Herron v. Southern Pac. Co.*, 283 U.S. 91, 94 (1931) (cited in *Hanna*, 380 U.S. at 473).[18]

The distinction between matters of substance and procedure under *Erie* cannot be reduced to "any automatic, 'litmus paper' criterion." *Hanna*, 380 U.S. at 460. The most fundamental command of *Erie* is that "the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts." *Byrd*, 356 U.S. at 535. Although the effect of rules on litigation outcomes is a relevant consideration in determining whether they are substantive in this sense, ""[o]utcome-determination' analysis was never intended to serve as a talisman," *Hanna*, 380 U.S. at 466-67, in part because "every procedural variation is 'outcome-determinative'" when an issue over its application arises in the course of an action. *Id.* at 468; *see also Gasperini*, 518 U.S. at 427-28; *Byrd*, 356 U.S. at 537. At least since *Byrd* and *Hanna*, it has been clear that courts must avoid "the classic *Erie* mistake of regard-

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[18] Before the Rules Enabling Act, Congress had, under various iterations of the "Conformity Act," required federal courts to follow the forms of practice and procedure of state courts. Even under that regime, this Court recognized that state law was powerless to regulate the "function of a federal court," *Herron*, 283 U.S. at 94, and that application of state rules of procedure was permissible only because Congress had authorized it. *See Wayman v. Southard*, 23 U.S. 1, 49-50 (1825).

ing whatever changes the outcome as substantive." *Gasperini*, 518 U.S. at 465 (Scalia, J., dissenting).

Hanna instead emphasized that the categorization of any rule as procedural or substantive for *Erie* purposes must reflect "the policies underlying the *Erie* rule." 380 U.S. at 467. Those policies include avoiding "unfair" differences in the character of federal and state litigation, and the "inequitable administration of laws," *id.* at 468, that resulted when one party, but not the other, could select a forum that would apply "materially" different rules of decision. *Id.* at 467.[19] The policy of discouraging "forum-shopping" based on such material differences bears on the application of the substance/procedure distinction for *Erie* purposes, *see Hanna*, 380 U.S. at 468; *Gasperini*, 518 U.S. at 428, but it is no more talismanic than outcome-determinacy. Indeed, as Justice Harlan pointed out, "a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more

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[19] At the time of *Erie*, and of *Hanna* as well, a diverse plaintiff had a choice of forum unavailable to the defendant because a defendant sued in state court in its home state could not remove the action to federal court. As discussed further below, this inequality, which was critical to the Court in *Erie*, *see* 304 U.S. at 74-75, has been eliminated with respect to most class actions involving even the most minimal diversity between the plaintiff class and the defendants, as defendants sued in state court in such actions can remove them to federal court without regard to the state in which they are filed. *See* 28 U.S.C. § 1453(b).

favorable judge." *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

B. CPLR 901(b) Is Not "Substantive" Under *Erie*.

1. Section 901(b) Involves the Mechanism for Enforcing Rights, Not the Definition of Those Rights.

Even if *Erie* rather than *Hanna* provided the correct test of CPLR 901(b)'s applicability in a federal diversity action, a proper application of *Erie* principles would yield the same result as does *Hanna* in this case: CPLR 901(b) does not apply in a federal diversity action because it is procedural, not substantive. Indeed, many of the same considerations that demonstrate that class action rules are reasonably classed as "procedural" for *Hanna* purposes and that the application of Rule 23 rather than section 901(b) does not alter "substantive rights" also support the characterization of CPLR 901(b) as procedural under *Erie*. *See Hanna*, 380 U.S. at 471 (noting that Rules Enabling Act and *Erie* are parallel, though not identical).

Although the category of "substantive" rules under *Erie* is broader than those that create "substantive rights" under the Rules Enabling Act, *see Hanna*, 380 U.S. at 471-72, the application of CPLR 901(b) is not a matter of substance. Unlike other state-law rules that this Court has held to be substantive for *Erie* purposes, CPLR does not define or limit the duties owed by one person or entity to another,[20] determine whether a person possesses a

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[20] *E.g.*, *Erie*, 304 U.S. at 80.

right of recovery for the breach of such duties,[21] bar any person from asserting such a right (as under a statute of limitations) or otherwise provide a defense to a claim,[22] determine the proper amount of recovery for a breach of duty,[23] or decide what substantive law will be selected to resolve such issues.[24] Certification of a class in federal court that would be barred in state court under CPLR 901(b) would not allow any class member to recover on any claim for which that class member could not successfully sue in state court. The state rule is thus not one that would "bar any recovery" to any plaintiff, but would only "alte[r] the way" in which recovery was sought. *Hanna*, 380 U.S. at 469.

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[21] *E.g., Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (holding that a state law denying an unregistered corporation the right to sue to recover for injuries was applicable to a federal diversity action under *Erie*).

[22] *E.g., Guar. Trust Co. v. York*, 326 U.S. 99 (holding that state statutes of limitation apply in diversity actions); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (holding state law governs the running of statutes of limitations in diversity actions); *Walker v. Armco Steel Corp.*, 446 U.S. 640 (same); *Palmer v. Hoffman*, 318 U.S. 109 (1943) (holding that state-law principles governing the burden of proving a defense are substantive under *Erie*).

[23] *E.g., Gasperini*, 518 U.S. at 429-31 (holding that principles of state law limiting the amount of damages to be awarded a plaintiff are substantive and apply in diversity cases, but that state procedures for determining whether damages are excessive do not apply in federal courts).

[24] *E.g., Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding that state conflicts of laws principles govern diversity cases).

This case is also quite unlike *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), in which the Court held that state law determines the conditions under which a shareholder may bring a derivative action on behalf of a corporation (and also, in *Cohen*, controls the issue of the shareholder's liability to the corporation in the event that the derivative action is unsuccessful). Those cases turned on the idea that, as the Court said in *Kamen*, "delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'" 500 U.S. at 96-97. *See Cohen*, 337 U.S. at 549 ("[I]nternal relations between management and stockholders are dependent upon state law."). In short, the rules at issue in *Cohen* and *Kamen* defined the respective duties and rights of corporate shareholders and directors.

The state rule here does not similarly define substantive rights and duties, nor is it otherwise aimed at regulating "primary conduct"—that is, the way people behave out of court—which is perhaps the truest hallmark of a "substantive" rule. As Justice Harlan stated in his influential concurring opinion in *Hanna*:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.

380 U.S. at 475. The rule in *Erie* itself was such a rule, defining when a railroad owed a duty of care toward trespassers on its right-of-way. *See* 304 U.S. at 70. Section 901(b), by contrast, does not excuse defendants in whole or in part from their duties under statutes that impose penalties—here, the duty to make timely payments or pay interest—nor does it excuse defendants from liability to any plaintiff who might, absent the rule, seek a recovery through participation in a class action. It only governs, in state court, the mechanism by which plaintiffs may seek the recoveries to which each is entitled as a matter of state law.

Even under its most expansive iteration in *Guaranty Trust Co. v. York*, which for a time appeared to usher in a rigid "outcome-determinative" test from which the Court later retreated,[25] *Erie* has never limited federal courts to the mechanisms state courts offer for the vindication of state-created rights. The *Erie* doctrine has instead recognized the power of federal courts to use available equitable means to provide a "remedy for a substantive right recognized by a State even though a State court cannot give it." *York*, 326 U.S. at 106. As the Court there explained:

> [T]he body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in

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[25] *See Byrd*, 356 U.S. at 537-38; *Hanna*, 380 U.S. at 466-69; Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 708-09.

> so doing they were enforcing rights created by the States and not arising under any inherent or statutory federal law.

Id. Class actions, as noted above at 29-30, are a part of the traditional body of equitable practice and procedure. So long as they are used only to enforce rights created by state law, they are procedural under *Erie* and thus are not governed by state law.

2. *Erie*'s Concerns About Fairness and "Forum-Shopping" Do Not Compel Application of State Class Action Rules by Federal Courts.

For many of the reasons just explained, the inapplicability of CPLR 901(b) does not give rise to the sort of "unfairness" that has concerned the Court in the line of cases running from *Erie* through *Hanna* to the present. The fundamental unfairness that drove the Court's decision in *Erie* was that under the doctrine of *Swift v. Tyson*, 41 U.S. 1 (1842), in which federal courts in diversity actions applied "general common law" rather than the common law of particular states, "rights enjoyed under the unwritten 'general law' var[ied] according to whether enforcement was sought in the state or in the federal court." *Erie*, 304 U.S. at 74-75. Here, by contrast, application of CPLR 901(b) is not necessary to ensure that the state-law rights of each class member and each defendant remain unchanged regardless of whether the action is brought in state or federal court.

Nor does *Erie*'s concern with forum-shopping dictate application of CPLR 901(b) by a federal court. To begin with, the type of forum-shopping that is of principal concern under *Erie* occurs when a plaintiff

who could not obtain a recovery in state court brings an action in federal court to obtain a different result, *see Hanna*, 380 U.S. at 469, which will not be the case for any class member here. Rather, if the availability of class relief motivates the filing of an action in federal rather than state court, that merely reflects a legitimate preference for "the advantages of the Federal Rules of Civil Procedure." *Id.* at 475 (Harlan, J., concurring).

Moreover, any judicial antipathy to litigants' forum preferences in these circumstances must yield to the contrary policy expressed by Congress in enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. In CAFA, Congress amended the diversity jurisdiction statute, 28 U.S.C. § 1332, to provide for jurisdiction over class actions involving minimal diversity of citizenship between any class member and any defendant if the class consists of at least 100 members and the aggregate amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2), (5) & (6). CAFA created not only original jurisdiction over such actions, but also expansive removal jurisdiction over any action within the scope of § 1332(d)(2), by abrogating the usual rules that all defendants must consent to removal and that a defendant sued in the courts of its home state may not remove on diversity grounds. *See* 28 U.S.C. § 1453(b). Thus, CAFA provided both class plaintiffs and each defendant in a class action meeting the minimal diversity, size, and amount-in-controversy requirements the option to choose a federal forum. In this case, it was the plaintiffs who invoked the diversity jurisdiction created by CAFA to select a federal forum.

Congress enacted CAFA with the specific intent of allowing parties, whether plaintiffs or defendants, to choose a federal forum for class actions based on a preference for the application of federal procedural rules. In enacting CAFA, Congress found that "[c]lass actions are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." CAFA § 2(a)(1), 28 U.S.C. § 1711 note. However, Congress also found that class actions had been subject to "abuses" by state courts, *id.* § 2(a)(4), and it stated that the purposes of CAFA included both "assur[ing] fair and prompt recoveries for class members with legitimate claims," and "providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(1)-(2).

Prominent among the "abuses" that supporters of CAFA invoked was the perceived willingness of state courts to certify classes in circumstances where the application of standards developed by the federal courts under the Federal Rules of Civil Procedure would call for denial of certification:

> A fourth type of class action abuse that is prevalent in state courts in some localities is the "I never met a class action I didn't like" approach to class certification. Some state courts with this permissive attitude have even certified classes that federal courts had already found uncertifiable. In one case, for example, a state court judge certified a nationwide class of persons who claimed that the house siding they had pur-

> chased was defective. Later, a federal district court judge presented with the same case rejected any prospect of certifying a class in that manner ....

S. Rep. No. 109-14, at 22 (Feb. 28, 2005).

CAFA sought to remedy these perceived abuses by moving class actions involving diverse parties into federal court, where federal class certification standards would apply. Thus, CAFA's supporters advocated the law based on their view that "'federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly.'" *Id.* at 53 (quoting Deborah Hensler et al., *Class Action Dilemmas, Pursuing Public Goals for Private Gain* 28 (1999)). At the same time, CAFA's supporters contended that it would not unduly inhibit the use of class actions, because federal courts applying federal standards would certify classes in appropriate cases. *Id.* at 64. Indeed, they emphasized, "federal courts invented class actions and have led the way in using the device to redress grievances, particularly in the civil rights and consumer protection context." *Id.* Moreover, while repeatedly acknowledging that the class actions moved to federal courts under CAFA would continue to be governed by "substantive" state law under *Erie*, the Act's backers acknowledged that CAFA could lead to different outcomes as federal courts applied different standards in determining whether to certify classes. *Id.* And they made clear their expectation that Rule 23, "the rule governing federal court class actions," *id.* at 6, would apply to cases brought in or removed to federal courts under CAFA. *See id.* at 54. In short,

CAFA's backers fully expected that by determining "the procedural rules regarding which courts can hear class actions," CAFA would, "consequently," determine "which procedural law will apply to such cases." *Id* at 7.

Although the "abuses" CAFA's supporters invoked principally involved state-court certification of classes that might not have been certified by federal courts, the legislation grants both plaintiffs and defendants the ability to choose a federal forum and purports to encourage the certification of classes where plaintiffs have "legitimate claims." See CAFA § 2(b)(1), 28 U.S.. § 1711 note. Moreover, as this Court has noted, class action procedures must deal even-handedly with both plaintiffs and defendants. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (declining to apply the collateral order appealability doctrine to class certification decisions in a way that would favor only plaintiffs).[26] A policy favoring a federal forum for class actions because of the perceived superiority of federal procedural rules is no less applicable where those rules support use of class actions than where they do not.

CAFA, in short, reflects a congressional policy to enable both class plaintiffs and defendants to choose a federal forum based explicitly on a preference for application of federal class certification standards. By allowing plaintiffs and defendants alike to choose the federal forum—even when the defendants have been sued in the courts of their own states—

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[26] *Cf.* Fed. R. Civ. P. 23(f) (allowing permissive appeals by both plaintiffs and defendants from class certification rulings).

Congress addressed the problem of unfairness that *Erie* saw in giving plaintiffs only a choice of forum that was denied to in-state defendants. *See Erie*, 304 U.S. at 74-75.

The congressional policy, reflected in CAFA, of encouraging federal jurisdiction over class actions because of the perceived superiority of federal certification standards displaces any policy that might otherwise favor application of state class-action standards to deter "forum-shopping" under CAFA's jurisdictional provisions. *Erie*'s policy of discouraging "forum-shopping" is a judicial creation, and like all judge-made policies, it is subject to modification by Congress. *Cf. City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (congressional policies displace federal common law); *Williams v. Austrian*, 331 U.S. 642, 661 (1947) (statutory policies "should not be hedged by judge-made principles not in accord with those aims").[27]

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[27] *Erie* is based in part on constitutional limits on Congress's power to enact substantive law governing conduct that is not subject to federal regulation under Article I of the Constitution. *See Erie*, 304 U.S. at 78. But neither *Erie* nor any other opinion of this Court suggests that Congress may not exercise powers that it undoubtedly possesses, such as the power to regulate practice and procedure in the federal courts, in ways that might encourage forum-shopping. *See Hanna*, 380 U.S. at 471-72; *see also Sibbach*, 312 U.S. at 9-10 (noting that although Congress may only impose "a right or duty ... in a field committed to Congress by the Constitution," it "has undoubted power to regulate the practice and procedure of federal courts").

C. Requiring Federal Courts to Apply State Rules Governing Class Certification Would Be Unworkable and Unwise.

A holding that federal courts must apply a state procedural rule determining whether a class may be certified would not only be contrary to this Court's teachings in *Hanna* and *Erie* and the many cases following them; it would also generate a host of negative consequences.

First, such a ruling would permit states, by adopting restrictive class-action rules, to deprive federal courts and litigants of the benefits of a procedural device that, as both this Court and Congress have recognized, promotes the fair and efficient adjudication of claims that present common issues affecting large numbers of litigants.[28] States could, by eliminating class actions for particular types of claims or across the board (as Mississippi and Virginia have already effectively done[29]), determine how federal courts must allocate resources and manage matters before them, to the detriment of both sound judicial practice and the federal courts' inherent authority to govern their own procedures. *See Herron*, 283 U.S. at 94; *Wayman v. Southard*, 23 U.S. at 1, 49-50. That in some cases the result of applying state law forbidding class actions might be that a case would not proceed in federal court at all (because the federal court's CAFA jurisdiction depends on

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[28] *See* CAFA § 2(a)(1), 28 U.S.C. § 1711 note; *see also* cases cited *supra* at 26-29.

[29] *See Wade v. Danek Medical, Inc.*, 182 F.3d 281 (4th Cir. 1999); *Janssen Pharmaceutica, Inc. v. Armond*, 866 So.2d 1092 (Miss. 2004).

whether the case is a class action) would not diminish the detrimental impact of such state interference with sound judicial management. As this Court has noted, "[t]hat small individual claims otherwise might be limited to local and state courts rather than a federal forum does not justify ignoring the overall problem of wise use of judicial resources." *Roper*, 445 U.S. at 340.

Furthermore, if this Court were to hold that whether a case may proceed as a class action is an issue of substantive law as to which state law controls in a federal diversity action, that legal principle could not logically be limited to cases in which state law would *deny* class treatment. If an entitlement not to be a defendant in a class action is a substantive right, then the entitlement to bring an action as a class is, equally, a substantive right. And if that is the case, then courts in all diversity class actions must look to state rules and decisional law rather than to Rule 23 and the case law applying it in making their class certification decisions. Such a regime would pose great practical difficulties for the federal district courts, which would have to become familiar with multiple procedural standards governing class actions. That result would run headlong into what this Court has called "[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure." *Burlington Northern*, 480 U.S. at 5.

Moreover, if state law governs the circumstances under which claims may be aggregated under Rule 23, it would presumably also displace other federal rules addressing similar topics, such as joinder and

intervention. For instance, if CPLR 901(b) were also to preclude joinder of, say, more than 20 claims seeking statutory penalties, the logic of the decision below would preclude a federal district court from applying Rule 20(a) to permit joinder of 25 plaintiffs in an action seeking such relief.

Application of state class-action rules in diversity actions would also turn CAFA on its head. From a grant of jurisdiction aimed at making a uniform body of federal law governing class certification applicable to all diversity class actions satisfying the statute's criteria, CAFA would be transformed into a font of jurisdiction compelling the federal courts to accept jurisdiction over and apply unfamiliar state procedural standards to class actions based on state substantive law. Federal courts in such cases would be compelled to follow the very state precedents *allowing* class certification that the supporters of CAFA said they were creating federal jurisdiction to avoid. *See, e.g.*, S. Rep. No. 109-14, at 24-26.

It is no answer to observe that some state class action rules use language similar if not identical to Rule 23. Other states, including not only New York but also California,[30] have rules that differ significantly from Rule 23, and, as noted earlier, two states (Mississippi and Virginia) do not generally permit class actions in their courts. Moreover, each state's judicial interpretation of its own rule establishes the law of that state, and to the extent state courts interpret their rules—however close their language is to Rule 23—to allow class actions where the federal

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[30] *See* Cal. Code. Civ. P. § 382.

courts would not, or vice versa, state law and federal law are different.

> Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State. ... This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules.

Johnson v. Fankell, 520 U.S. 911, 916 (1997). A ruling that state class action standards are applicable in federal diversity actions would thus necessarily require federal courts to canvass and apply divergent state decisional law on class certification.

CONCLUSION

Federal courts have long led the way in developing the class action as a procedural device for use in adjudication of rights, regardless of the substantive law that is their source. First as a general tool of equity jurisprudence, then as a product of the Equity Rules, and ultimately as a procedure laid out in original Federal Rule of Civil Procedure 23 and its innovative and extensive revisions in 1966 and 2003, the class action has been recognized as a mechanism available for use in diversity and federal question cases alike. Substituting state-law limitations on the use of class actions for the flexible approach offered by Rule 23 would upset generations of settled practice and violate the fundamental principle that federal authority to regulate procedures in federal courts is exclusive and that absent permission by Congress, the states have no power to dictate federal

judicial procedure. *Wayman v. Southard*, 23 U.S. at 1, 49-50.

For these reasons, the judgment of the court of appeals affirming the district court's dismissal of the complaint should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorneys for Petitioner

July 2009

APPENDIX

STATUTES AND RULES

The Rules Enabling Act, 28 U.S.C. § 2072, provides:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Title 28 U.S.C. § 1332 provides, in pertinent part:

Diversity of citizenship; amount in controversy; costs

* * *

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

* * *

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

* * *

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

Section 2 of the Class Action Fairness Act of 2005, Pub. L. 109–2, 119 Stat. 4, 28 U.S.C. § 1711 note, provides, in pertinent part:

> (a) FINDINGS.—Congress finds the following:
>
> (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
>
> (2) Over the past decade, there have been abuses of the class action device that have—
>
> (A) harmed class members with legitimate claims and defendants that have acted responsibly;
>
> (B) adversely affected interstate commerce; and
>
> (C) undermined public respect for our judicial system.
>
> * * *
>
> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

New York Civil Practice Law and Rules § 101 provides:

Short title; application.

This chapter shall be known as the civil practice law and rules, and may be cited as "CPLR." The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute. The civil practice law and rules shall succeed the civil practice act and rules of civil practice and shall be deemed substituted therefor throughout the statutes and rules of the state. Reference to a provision in the civil prac-

tice law and rules may, except when such provision is being enacted or amended, be made without indicating whether it is a rule or section.

New York Insurance Law § 5106(a) provides:

Fair claims settlement

(a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

No. 08-1008

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
620 Eighth Ave., 32d fl.
New York, NY 10018
(212) 218-5554

CHRISTOPHER LANDAU, P.C.
Counsel of Record
BRITT C. GRANT
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5087

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QUESTIONS PRESENTED

The petition for certiorari presented the following three questions:

1. Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?

2. Can state legislatures dictate procedure in the federal courts?

3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Allstate Insurance Company states that it is a wholly owned subsidiary of a publicly held corporation, The Allstate Corporation, and that no other publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This case presents the question whether a plaintiff can transform a dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty by simply filing in federal rather than state court. Petitioner Shady Grove contends that respondent Allstate violated a New York insurance statute and is thus liable for a statutory penalty under state law. Shady Grove has no interest, however, in pursuing an individual penalty from Allstate, which (by Shady Grove's own reckoning) would amount to no more than $500. Rather, Shady Grove is intent on maximizing Allstate's potential liability (as well as its own settlement leverage and attorneys' fees) by pursuing a class action seeking an aggregate penalty of no less than $5 million. The problem for Shady Grove is that the New York Legislature decided to prevent the aggregation of penalties in a single lawsuit by enacting the provision at issue here, N.Y. C.P.L.R. § 901(b), which forbids the recovery of state statutory penalties in class actions absent express statutory authorization.

There is no question, thus, that Shady Grove could not bring this putative class action in the courts of New York; rather, the only question is whether Shady Grove can evade § 901(b) by filing in federal court. The answer to that question, as the courts below recognized, is no. Nothing in § 901(b) conflicts with Rule 23 of the Federal Rules of Civil Procedure, and a refusal to apply § 901(b) in federal court would not only thwart New York's interest in defining and limiting its own causes of action but also promote forum-shopping and the inequitable administration of the laws.

Shady Grove devotes the bulk of its brief to arguing that § 901(b) does indeed conflict with Rule 23. That argument boils down to the proposition that Rule 23 gives a district court discretion to certify a class in each and every case litigated in federal court, even where the legislative body that created the underlying cause of action has specified that it is categorically ineligible for class certification. That proposition is manifestly incorrect: Rule 23 establishes the *criteria* for class certification in federal court, but does not speak to the antecedent question whether any particular cause of action is eligible for class certification in the first place. Indeed, a variety of federal causes of action are categorically ineligible for class certification under Rule 23. Shady Grove's interpretation of Rule 23 to override substantive policy decisions that certain claims are categorically ineligible for class certification would take the Rule into forbidden territory beyond the bounds of the Rules Enabling Act.

Shady Grove tries to get around this point by insisting that § 901(b) must be procedural, and hence inapplicable in federal court, because a class action itself is procedural. That argument is a *non sequitur*. A legislature may impose substantive limitations on a procedural device, and indeed both the Federal Government and most States have done so by either limiting the amount that can be recovered for particular claims in class actions, or (as New York has done here) by rendering certain claims categorically ineligible for class certification in the first place. Section 901(b) effectively caps a defendant's liability in a particular lawsuit—the maximum penalty that may be imposed in that

lawsuit is the penalty available to an individual plaintiff.

At the end of the day, this is a case about federalism and fairness. Section 901(b) in no way alters the procedural criteria for class certification; rather, it represents a substantive policy choice to limit the liability that may be imposed in a particular lawsuit. Under the Rules of Decision Act, the federal courts are constrained to respect such substantive policy choices: a State's power to create liability under its own laws surely includes the power to limit such liability, and a State may limit liability either by capping the amount that may be recovered in a class action or by precluding class certification for particular claims. Were state-law prohibitions on class actions for particular state-law claims inapplicable in federal court, as this case highlights with crystal clarity, litigants would be drawn to federal court like metal to a magnet, and a State's efforts to limit liability for those claims effectively thwarted. The Class Action Fairness Act, which extended federal jurisdiction over state-law class actions to curb state-court abuses, would ironically be transformed into an engine for evading state-law prohibitions on class actions. Because nothing in federal law either requires or permits that result, this Court should affirm the judgment.

RELEVANT STATUTORY PROVISIONS

The Rules of Decision Act provides:

State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

The Rules Enabling Act provides:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 U.S.C. § 2072.

Section 901 of New York's Civil Practice Law and Rules provides as follows:

§ 901. Prerequisites to a class action

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

N.Y. C.P.L.R. § 901.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case arises out of a May 2005 automobile accident in which Sonia Galvez was injured. Joint

Appendix (JA) 12. The car driven by Ms. Galvez was registered in New York, carried New York license plates, and was insured under a "New York Private Passenger Auto Insurance Policy" issued by respondent Allstate Insurance Company. *Id.*

After the accident, Ms. Galvez sought medical treatment for her injuries from petitioner Shady Grove Orthopedic Associates, P.A., a Maryland orthopedic clinic. JA7-8. As part of her payment for those services, Ms. Galvez assigned Shady Grove certain rights to payment from Allstate under her automobile insurance policy. JA8 & n.1.

Shady Grove sought and received payment for those services from Allstate. JA7. Nonetheless, Shady Grove took the position that Allstate should have made those payments sooner, and that its failure to do so violated a New York insurance statute, N.Y. Ins. Law § 5106(a). Under that statute, if an insurer fails to either deny or pay claims arising out of an automobile accident within 30 days, it is subject to a statutory interest penalty of 2% per month. *See id.* Shady Grove thus claimed that it was entitled to a statutory 2% monthly interest penalty, which in this case (by Shady Grove's own reckoning) amounted to no more than $500. Pet. App. 4a.

B. Procedural History

Shady Grove filed this putative class action against Allstate in federal court in April 2006. JA6-23. Although the complaint raised only state-law claims, Shady Grove invoked federal jurisdiction under a provision of the Class Action Fairness Act (CAFA) that extends federal jurisdiction over state-law class actions involving at least $5 million in

controversy and minimal diversity of citizenship between the parties. JA7 (invoking federal jurisdiction under 28 U.S.C. § 1332(d)(2)(A)). Shady Grove conceded that there was no basis for federal jurisdiction other than CAFA, given the modest size of Shady Grove's individual claim against Allstate. Pet. App. 4a, 34a, 36a.

Allstate moved to dismiss the action, and the district court (Gershon, J., E.D.N.Y.) granted the motion. Pet. App. 19-36a. Because § 901(b) by its plain terms precludes Shady Grove from bringing a class action to recover statutory penalties under New York law, the court explained, the only question was whether that statute applies in federal as well as state court. Pet. App. 26-29a, 33-34a. Concluding—as have other federal courts—that it does, the court granted the motion to dismiss. *See id.* at 36a.

A unanimous panel of the Second Circuit affirmed. Pet. App. 1-18a. The Second Circuit agreed with the district court that § 901(b) is "substantive," rather than "procedural," because it would lead to very different results in federal than in state court, and thus encourage forum-shopping. Pet. App. 11-12a, 15-16a. The court also emphasized that nothing in § 901(b) conflicts with Rule 23 of the Federal Rules of Civil Procedure, which establishes the criteria for class certification in federal court. Pet. App. 10-14a. And the court rejected the notion that applying § 901(b) in federal court would offend basic tenets of federalism, noting that § 901(b) is a *state*-law limitation on a *state*-law cause of action. Pet. App. 16-17a.

SUMMARY OF ARGUMENT

This Court should join the courts below by holding that N.Y. C.P.L.R. § 901(b) applies in federal as well as state court. The basic point here is simple: § 901(b) represents a substantive policy choice by New York to limit the state statutory penalty that may be imposed in a single lawsuit. Congress and many other States have made similar substantive policy choices by either limiting the liability that may be imposed in a class action (*see infra* Appendix A) or by rendering certain claims categorically ineligible for class certification (*see infra* Appendix B). At least since this Court's seminal decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that the federal courts must give effect to such substantive state policy choices in cases arising under state law.

There is no merit to Shady Grove's argument that Rule 23 of the Federal Rules of Civil Procedure covers the same ground as § 901(b), and thereby forecloses the application of the state statutory provision in federal court. There is no conflict whatsoever between Rule 23 and § 901(b). Rule 23 sets forth the criteria governing class certification in federal court, but does not address the antecedent question whether a given claim is eligible for class certification in the first place. Where, as here, a legislature has declared particular claims categorically ineligible for class certification for reasons unrelated to the certification criteria, those criteria never come into play. Indeed, any contrary interpretation of Rule 23 that would allow federal courts to override a substantive policy decision that a particular cause of action is categorically ineligible

for class certification would violate the Rules Enabling Act.

Nor is there any merit to Shady Grove's alternative argument that § 901(b) does not apply in federal court because that provision is procedural, rather than substantive, in nature for *Erie* purposes. In essence, that argument boils down to the proposition that any limitation on class actions must be procedural because class actions themselves are procedural. But that proposition is incorrect: as noted above, New York—like the Federal Government and many other States—has simply made a substantive policy decision to limit the liability that can be imposed in a particular lawsuit. Under § 901(b), the maximum state statutory penalty that can be imposed in a particular lawsuit is the penalty that can be recovered by an individual. This limitation prevents class certification from distorting statutory penalties by creating a threat of massive liability for a technical violation of law that did not inflict any actual injury.

Indeed, a refusal to apply § 901(b) in federal court would thwart *Erie*'s twin aims of preventing both inequitable administration of the laws and forum-shopping. There is no question that § 901(b) prevents Shady Grove from bringing a class action in New York state court. Thus, if § 901(b) does not apply in federal court, Shady Grove can transform this dispute over a penalty of no more than $500 into a dispute over an aggregate penalty of no less than $5 million by simply crossing the street from state to federal court. Nothing in *Erie* either requires or tolerates that result. Accordingly, this Court should affirm the judgment.

ARGUMENT

The Courts Below Correctly Held That N.Y. C.P.L.R. § 901(b) Applies In Federal Court.

The courts below correctly held that N.Y. C.P.L.R. § 901(b), which categorically precludes class actions seeking "to recover a penalty, or minimum measure of recovery created or imposed by statute," applies in federal court and requires dismissal of this lawsuit. Pet. App. 1-18a, 19-36a.[1] As those courts recognized, that provision represents a substantive policy decision to limit the state statutory penalty that may be imposed in a particular lawsuit. Pet. App. 11-12a, 15-16a, 26-29a. And because that substantive policy decision is in no way inconsistent with any Federal Rule of Civil Procedure, it applies in federal court to prevent unfairness and forum-shopping. Pet. App. 7-17a, 26-29a.[2]

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[1] Section 901(b) creates a single exception to its categorical rule: a plaintiff may pursue a class action to recover a penalty or minimum measure of recovery where "a *statute* creating or imposing a penalty, or a minimum measure of recovery *specifically authorizes* the recovery thereof in a class action." N.Y. C.P.L.R. § 901(b) (emphasis added). Shady Grove argued below that a state administrative regulation brought this case within the scope of that exception, but both the district court and the Second Circuit rejected that state-law argument, *see* Pet. App. 17-18a, 32-34a, and Shady Grove did not preserve the argument in its petition for certiorari, *see* Pet. i.

[2] *See also In re Onstar Contract Litig.*, 600 F. Supp. 2d 861, 875 (E.D. Mich. 2009); *Gordon v. Kaleida Health*, No. 08-CV-378S, 2008 WL 5114217, at *10 (W.D.N.Y. Nov. 25, 2008); *Gratt v. ETourAndTravel, Inc.*, No. 06-CV-1965, 2007 WL 2693903, at *1-2 (E.D.N.Y. Sept. 10, 2007); *In re Automotive Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549-50 (E.D. Pa. (cont'd ...)

As might be expected more than seventy years after this Court's landmark decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the parties are in general agreement about the analytical framework governing this case. The Rules of Decision Act, as interpreted and applied in *Erie* and subsequent cases in its wake, mandates that "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). Accordingly, the core inquiry under *Erie* is whether a particular state law is best classified as "substantive" or "procedural" for purposes of the Rules of Decision Act. *See id.* That inquiry is "usually unproblematic" where the state statute "[c]oncern[s] matters covered by the Federal Rules of Civil Procedure": "if the Rule in point is consonant with the Rules Enabling Act ... and the Constitution, the Federal Rule applies regardless of contrary state law." *Id.* at 427 n.7 (citing *Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965)).

2007); *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 185-86 (E.D.N.Y. 2007); *Bonime v. Avaya, Inc.*, No. 06-CV-1630, 2006 WL 3751219, at *3 (E.D.N.Y. Dec. 20, 2006), *aff'd*, 547 F.3d 497 (2d Cir. 2008); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 290-91 (S.D.N.Y. 2005); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004); *United States v. Dentsply Int'l, Inc.*, No. 99-005, 2001 WL 624807, at *16 (D. Del. Mar. 30, 2001); *Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72, 84 (S.D.N.Y. 1999); *but see G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07 C 5953, 2009 WL 2581324, at *3 (N.D. Ill. Aug. 20, 2009) (concluding, without analysis or recognition that this issue is pending before this Court, that § 901(b) does not apply in federal court because "federal procedural rules govern cases once they are removed to federal court").

Shady Grove relies primarily on the latter point, devoting the bulk of its brief to arguing that Rule 23 validly covers the ground occupied by § 901(b), and thus overrides the state statute under *Hanna*. *See* Shady Grove Br. 12-40. In the alternative, Shady Grove also argues that § 901(b) is best classified as procedural, rather than substantive, for *Erie* purposes. *See id.* at 41-57. As explained in detail below, Shady Grove is wrong on both scores.

A. Section 901(b) Does Not Conflict With Rule 23 Of The Federal Rules Of Civil Procedure.

1. Rule 23 Establishes The Criteria For Class Certification, Not The Eligibility Of Particular Claims For Certification.

Shady Grove first argues that § 901(b) conflicts with Rule 23 because "Federal Rule of Civil Procedure 23 provides the federal courts with discretionary authority to certify a class action, while New York's CPLR 901(b), if applicable in the federal courts, would deny that discretion." Shady Grove Br. 10; *see also id.* at 20 (arguing that § 901(b) would impermissibly deny federal courts "the discretion to certify a class that lies at the heart of the federal rule"). That argument is manifestly incorrect. Rule 23 establishes the *criteria* for class certification in federal court, but does not address the antecedent question whether any particular cause of action is eligible for the application of those criteria in the first place. Where, as here, a particular cause of action is categorically ineligible for class certification, Rule 23 does not—and, under the Rules Enabling Act, could not—authorize a district court to certify a class.

The "discretion" provided by Rule 23, in other words, is the procedural discretion to apply the class certification criteria set forth in the Rule to eligible causes of action, not the substantive discretion to decide whether a particular cause of action is eligible for class certification in the first place. *See, e.g.*, *Wade v. Danek Med., Inc.*, 182 F.3d 281, 290 (4th Cir. 1999) ("Rule 23 ... merely establishes the procedures for pursuing a class action in the federal courts."). The question whether a particular cause of action is eligible for class certification is legally and logically antecedent to the application of the class certification criteria. A court has no discretion under Rule 23 to apply those criteria to causes of action that are categorically ineligible for class certification.

Shady Grove thus errs by insisting that "the federal rule and the New York rule are incompatible." Shady Grove Br. 16 (capitalization modified). To the contrary, the two provisions are entirely compatible: § 901(b) simply "*removes* a category of claims from the realm in which a federal court may exercise its discretion," but does not interfere with the exercise of that discretion with respect to claims eligible for class certification. *Leider v. Ralfe*, 387 F. Supp. 2d 283, 290 (S.D.N.Y. 2005); *see also In re Automotive Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549 (E.D. Pa. 2007); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004). The application of the Rule 23 criteria presupposes that a particular cause of action is eligible for class certification. Where it is not, Rule 23 gives a court no discretion to certify a class.

Not surprisingly, Shady Grove identifies nothing in Rule 23 that either explicitly or implicitly gives a

federal court discretion to certify a class in each and every case. To the contrary, Congress itself has categorically precluded class certification under Rule 23 for particular cases and causes of action. *See, e.g.*, 8 U.S.C. § 1252(e)(1) (Illegal Immigration Reform and Immigrant Responsibility Act) ("[N]o court may ... certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection."); 29 U.S.C. § 206(d) (Equal Pay Act); *Ameritech Benefit Plan Comm. v. Commc'ns Workers of Am.*, 220 F.3d 814, 820-21 (7th Cir. 2000) (interpreting same to preclude Rule 23 class certification); 29 U.S.C. § 216(b) (Fair Labor Standards Act); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916-17 (5th Cir. 2008) (interpreting same to preclude Rule 23 class certification); 29 U.S.C. § 626(b) (Age Discrimination in Employment Act); *Grayson v. KMart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996) (interpreting same to preclude Rule 23 class certification); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir. 1975) (*per curiam*) (same). These statutes, needless to say, refute the unstated premise of Shady Grove's argument: that Rule 23 gives federal courts discretion to certify a class in each and every case litigated in federal court.

This case is thus a far cry from *Hanna*, on which Shady Grove places such heavy reliance. That case involved the question whether a state statute requiring in-person service on a defendant applied in a diversity action filed in federal court. At that time, Rule 4(d)(1) of the Federal Rules of Civil Procedure specified that service "'shall be made ... [1] by delivering a copy of the summons and of the

complaint to [the defendant] personally or [2] *by leaving copies thereof at his dwelling house ....*'" *Hanna*, 380 U.S. at 461 (quoting Fed. R. Civ. P. 4(d)(1); emphasis added). The plaintiff in that case left copies of the summons and the complaint at the defendant's residence, which "concededly" complied with the Federal Rule but not with the state service law. *Id.* at 461-62. Thus, a "clash" between federal and state law was "unavoidable": the federal rule did not require in-person service, while the state law did. *Id.* at 470. Under such circumstances, this Court held, an on-point Federal Rule governs unless it transgresses either the Rules Enabling Act or the Constitution, and a court need not engage in "the typical, relatively unguided *Erie* Choice." *See id.* at 471, 473-74.

Hanna applies, in other words, only where the relevant federal and state laws cover the same ground. *See id.* at 473; *see also Gasperini*, 518 U.S. at 427 n.7; *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.4 (1988); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980). But nothing in *Hanna* requires or permits courts to expand the scope of the Federal Rules. To the contrary, this Court has emphasized—in language tellingly missing from Shady Grove's brief—that federal courts must interpret the Federal Rules "with sensitivity to important state interests and regulatory policies." *Gasperini*, 518 U.S. at 427 n.7 (citing *Walker*, 446 U.S. at 750-52, and *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310-12 (7th Cir. 1995)).

Thus, in *Walker*, this Court held that state law rather than federal law governed the question when a diversity action was commenced in federal court for purposes of a state-law statute of limitations. *See* 446 U.S. at 748-53. Although Rule 3 of the Federal Rules of Civil Procedure specifies that "'[a] civil action is commenced by *filing* a complaint with the court,'" *id.* at 750 (emphasis added; quoting Fed. R. Civ. P. 3), the Court held that the Rule did not override a state law specifying that an action is not commenced for purposes of tolling the statute of limitations until the defendant is *served*, *see id.* at 751-52. The Federal Rule, the Court explained, "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Id.* at 751. Because the Federal Rule did not cover the same ground as the state law, the Court held, "the *Hanna* analysis does not apply." *Id.* at 752.

Similarly, in *S.A. Healy*—also cited with approval in *Gasperini*, *see* 518 U.S. at 427 n.7—the Seventh Circuit held that federal courts must apply a state law governing offers of judgment, even though Rule 68 of the Federal Rules of Civil Procedure also governs offers of judgment. *See* 60 F.3d at 310-12. Rule 68, the court explained, governs only offers of judgment by *defendants*, and does not implicitly prevent the application of the state statute to the extent it governs offers of judgment by *plaintiffs*. *See id.* "We cannot find anything in the history or structure of [Rule 68] to justify" an interpretation that it sweeps beyond its text to occupy the entire field of offers of judgment. *See id.* at 312.

Here too federal and state law do not cover the same ground. Because Rule 23 gives a district court no "discretion" to certify a class to pursue a cause of action that is categorically ineligible for certification, Shady Grove's reliance on *Stewart* and *Burlington* is misplaced. Both of those cases involved federal laws that gave federal courts discretion that would have been restricted by the application of state law in federal court. *Stewart* involved a federal statute giving district courts discretion to transfer cases based on a variety of factors, including contractual forum selection clauses. *See* 487 U.S. at 29 (citing 28 U.S.C. § 1404(a)). This Court held that an Alabama statute that categorically nullified such clauses would impermissibly interfere with that discretion and thus did not apply in federal court. *See id.* at 30-32. *Burlington* involved Rule 38 of the Federal Rules of Appellate Procedure, which gives courts of appeals discretion to impose sanctions for frivolous appeals. *See* 480 U.S. at 4 (citing Fed. R. App. P. 38). This Court held that an Alabama statute that imposed a mandatory affirmance penalty of 10% would impermissibly interfere with that discretion and thus did not apply in federal court. *See id.* at 7-8. Neither *Stewart* nor *Burlington* has any bearing where, as here, the application of state law in federal court would *not* impinge upon any discretion conferred by federal law.

Shady Grove insists, however, that "just as in *Burlington* and [*Stewart*], the federal rule's 'discretionary mode of operation' does not allow for the 'mandatory' or 'categorical' approach of the state statute, which would seize on *one of the many factors relevant to class certification under the federal rule* ... and make it dispositive." Shady Grove Br. 23

(emphasis added). The problem with that argument is that a categorical prohibition on class certification is not "one of the many factors relevant to class certification under the federal rule," *id.*; it is the predicate for the application of those factors in the first place. Nothing in § 901(b) in any way alters the criteria for class certification in federal court. Shady Grove, in a nutshell, is trying to blur the critical distinction between Rule 23's *criteria* for class certification and the antecedent *eligibility* of a particular cause of action for class certification.

Thus, Shady Grove argues that "Section 901 is similar to Rule 23 in that it sets forth the *criteria*" for class certification. Shady Grove Br. 19 (emphasis added). That argument is disingenuous at best. The criteria for class certification in New York are set forth in § 901***(a)***, *see supra* p. 5, and have no bearing here. There is no dispute that the criteria for class certification under state law do not apply in federal court; that is the ground squarely occupied by Rule 23. *See, e.g.*, 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 3d* § 1758 (3d ed. 2005) (noting that in a diversity action, "[f]ederal and not local standards ... will determine the various procedural elements of the class action"); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2009 WL 1707923, at *5 (E.D. La. June 16, 2009) (state criteria for class certification inapplicable in federal court), *recon. denied*, 2009 WL 2447846, at *3-5 (E.D. La. Aug. 6, 2009); *cf. Hanna*, 380 U.S. at 473-74. This case is all about § 901***(b)***, which has nothing to do with the criteria for class certification. Shady Grove cannot sidestep that inconvenient point by simply ignoring the distinction between the

subsections and arguing globally against the application of § 901 in federal court.

It is not true, in other words, that § 901(b) "modifies Section 901(a)'s criteria" by specifying that certain causes of action are categorically ineligible for class certification. Shady Grove Br. 35. Where the categorical prohibition of § 901(b) applies, the criteria of § 901(a) do not. Contrary to Shady Grove's argument, § 901(b) does not address the "predominance" of common issues or the "superiority" of a class action; rather, those considerations are squarely addressed by § 901(a), which concededly does not apply in federal court.

Nor can Shady Grove inflate the scope of Rule 23 by quoting snippets from cases to the effect that "Federal Rule of Civil Procedure 23 'deals comprehensively with class actions.'" Shady Grove Br. 16 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 (1978)); *see also id.* at 24 (quoting *Snyder v. Harris*, 394 U.S. 332, 341 (1969), for the proposition that Rule 23 "is applicable 'across the entire range of legal questions'"). This Court has never held nor hinted that Rule 23 overrides a legislative decision to render a particular cause of action categorically ineligible for class certification.

To the contrary, this Court has recognized that Rule 23 applies only "[i]n the *absence*" of legislative intent "to depart from the usual course" of allowing class certification in appropriate cases. *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (emphasis

added).[3] In other words, the default rule is that causes of action litigated in federal court are eligible for class certification under the criteria set forth in Rule 23, but that rule is by no means absolute. *See, e.g.*, *Sandoz*, 553 F.3d at 916-17 (interpreting federal statute implicitly to preclude class certification under Rule 23); *Ameritech*, 220 F.3d at 820-21 (same); *Grayson*, 79 F.3d at 1106 (same); *LaChappelle*, 513 F.2d at 288-89 (same). Where, as here, there is no question that the very legislative body that created a particular cause of action has decided that it is categorically ineligible for class

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[3] *Califano* presented the question whether Congress had implicitly rendered a particular cause of action ineligible for class certification by authorizing "'[a]ny individual'" to seek judicial review of particular administrative decisions. *See* 442 U.S. at 698-99 & n.12 (quoting 42 U.S.C. § 405(g)). This Court held that this language did not provide "the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Id.* at 700. Because that case involved federal legislation, it is not surprising that the Court stated that a "direct expression *by Congress*" was necessary to overcome the background presumption that claims litigated in federal court are eligible for class certification under the Rule 23 criteria. *Id.* (emphasis added). In context, it is clear that the reference to "Congress" was simply a shorthand for the legislature that created the underlying cause of action, not an attempt to distinguish between the *federal* legislature and a *state* legislature. Shady Grove thus errs by describing *Califano* as establishing a blanket rule that "absent a *congressional* decision to preclude class actions, Rule 23 authorizes class treatment of any federal action that satisfies the rule's criteria." Shady Grove Br. 25 (emphasis in original; citing *Califano*, 442 U.S. at 700). *Califano* did not involve a state cause of action, and thus had no occasion to draw any such distinction.

certification, Rule 23 does not allow a federal court to override that decision.

2. If Construed To Establish The Eligibility Of Particular Claims For Class Certification, Rule 23 Would Violate The Rules Enabling Act.

Indeed, any interpretation of Rule 23 that would allow federal courts to override a legislative decision that a particular cause of action is categorically ineligible for class certification would violate the Rules Enabling Act, 28 U.S.C. § 2072. Under that statute, the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." *Id.*; *see generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982). Interpreting Rule 23 to encompass not only the procedural criteria for class certification but also the antecedent decision whether a particular cause of action is eligible for class certification in the first place would take the Rule squarely into forbidden substantive territory. Accordingly, this Court should avoid any such interpretation. *See, e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (construing Fed. R. Civ. P. 41(b) to avoid an "arguabl[e] violat[ion]" of the Rules Enabling Act); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (construing Fed. R. Civ. P. 23(b)(1) to avoid "potential conflict with the Rules Enabling Act"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) ("Rule 23 ... must be interpreted with fidelity to the Rules Enabling Act.").

Shady Grove tries to circumvent this point by asserting that "Allstate has not argued in this case that Rule 23 is not valid, but, in any event, such an

argument would be unavailing" because class actions are procedural. Shady Grove Br. 10. But that assertion misses the point. Allstate does not contend that Rule 23 in all its applications transgresses the bounds of the Rules Enabling Act, but only that the Rule would transgress the Act if interpreted (as Shady Grove would have it) to override legislative decisions that particular causes of action are categorically ineligible for class certification. *See, e.g.*, *Semtek*, 531 U.S. at 503; *Ortiz*, 527 U.S. at 842; *Amchem*, 521 U.S. at 613-19, 629.

Shady Grove proves nothing, in other words, by arguing generically that "Rule 23 is a proper exercise of this Court's power under the Rules Enabling Act to regulate the practice and procedure of the federal courts." Shady Grove Br. 10; *see also id.* at 25-31. Even if the Rule is facially valid, the Act still prevents courts from interpreting or applying the Rule in particular cases in a way that abridges, enlarges, or modifies any substantive right. *See, e.g.*, *Ortiz*, 527 U.S. at 842-45; *Amchem*, 521 U.S. at 614-19. Thus, the Act necessarily lurks beneath every interpretation and application of the Rule, *see, e.g.*, *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), and courts always must be "mindful" of the Act in interpreting and applying the Rule, *Amchem*, 521 U.S. at 612-13. Shady Grove's argument that Rule 23 does not facially violate the Rules Enabling Act, in short, by no means sweeps the Act out of this case.

The basic point here is simple: Rule 23 would "abridge, enlarge or modify" substantive rights if

interpreted to override a legislative decision, like the one reflected in § 901(b), that a particular cause of action is categorically ineligible for class certification. Shady Grove responds with the syllogism that a class action is a procedural device, § 901(b) is a limitation on class actions, so therefore § 901(b) by definition is procedural and can freely be overridden by Rule 23 without raising any concerns under the Rules Enabling Act. *See* Shady Grove Br. 25-40.

The problem with that syllogism is that a limitation on a procedural device can be substantive. As a threshold matter, some clarification of the concepts represented by the terms "procedural" and "substantive" is in order. Although this Court has often noted that distinguishing between these two concepts can be a challenging endeavor that depends on context, *see, e.g.*, *Jinks v. Richland County*, 538 U.S. 456, 465 (2003); *Gasperini*, 518 U.S. at 416; *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988); *Hanna*, 380 U.S. at 471; *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), "the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all," John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724 (1974). And, after all, "they are the terms the Enabling Act uses." *Id.*

On this point, at least, the parties are in agreement: "At bottom, a procedural rule is 'one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes.'" Shady Grove Br. 26 (quoting Ely, *Irrepressible Myth*,

87 Harv. L. Rev. at 724); *see also id.* at 33 (procedural rules govern "'the conduct of litigation'") (quoting *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941); emphasis omitted). And conversely, as the parties also agree, "'[t]he most helpful way ... of defining a substantive rule—or more particularly a substantive right, which is what the [Rules Enabling] Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.'" Shady Grove Br. 40 (quoting Ely, *Irrepressible Myth*, 87 Harv. L. Rev. at 725).

Returning to Shady Grove's syllogism, the key point here is that a legislature can restrict a procedural device such as a class action for substantive reasons, *i.e.*, reasons that have nothing to do with the conduct of the litigation process itself, as opposed to the outcome of that process. And that is precisely what the New York Legislature did by enacting § 901(b).

Fortunately, this Court need not speculate on this score: the New York Court of Appeals recently described the history and purpose of § 901(b) in great detail. *See Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 210-11 (2007). The question in that case was whether § 901(b) applied to prohibit class certification of claims seeking treble damages under New York's general antitrust statute, the Donnelly Act. In answering that question in the affirmative, the New York court detailed how and why that provision came to be adopted.

As *Sperry* explained, § 901(b) was enacted in 1975 as a part of a complete overhaul of New York's class action laws. *See* 8 N.Y.3d at 210. The initial

legislative proposal, which eventually became § 901(a), was limited to the procedural criteria for class certification (which largely mirror the federal criteria set forth in Federal Rules 23(a) and 23(b)(3)): "the five prerequisites of numerosity, predominance, typicality, adequacy of representation and superiority." 8 N.Y.3d at 211. In response to that proposal, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery, except when specifically authorized in the pertinent statute." *Id.* "These groups feared that recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved. They also argued that there was no need to permit class actions in order to encourage litigation by aggregating damages when statutory penalties and minimum measures of recovery provided an aggrieved party with a sufficient economic incentive to pursue a claim." *Id.*

The New York Legislature responded to these concerns by adding § 901(b) to the bill. *See id.* That provision has nothing to do with the criteria for class certification; rather, it limits the liability that may be imposed in a single lawsuit by prohibiting class actions to recover aggregate penalties. As the bill's sponsor, Assemblyman Stanley Fink, explained:

> The bill ... precludes a class action based on a statute creating or imposing a penalty or minimum measure of recovery unless the specific statute allows for a class action. These penalties or "minimum damages" are provided as a means of encouraging suits

> where the amounts involved might otherwise be too small. Where a class action is brought, this additional encouragement is not necessary. A statutory class action for actual damages would still be permissible.

Id. (citing Sponsor's Mem., Bill Jacket, L. 1975, ch. 207). Hence, "the final bill, which was passed by the Legislature and approved by the Governor on June 17, 1975, was the result of a *compromise* among competing interests," *id.* (emphasis added)—the Legislature created a new class action mechanism but protected defendants from being subjected to aggregate statutory penalties in a single lawsuit.

There can be no doubt, then, that § 901(b) is substantive in nature: the provision is not concerned with the conduct of the litigation process itself, but instead with the outcome of that process. *See, e.g.*, Pet. App. 11-12a ("CPLR 901(b) ... is a substantive rule that eliminates statutory penalties under New York law as a remedy for class action plaintiffs."); *Relafen*, 221 F.R.D. at 285 ("C.P.L.R. 901(b) expresses a state interest in avoiding 'annihilatory punishment' by discouraging multiple recoveries of statutory penalties.") (quoting *Lennon v. Philip Morris Cos.*, 734 N.Y.S.2d 374, 380 (N.Y. Sup. Ct. 2001)). As the New York Attorney General noted in an *amicus curiae* brief in *Sperry*: "C.P.L.R. 901(b) ... *was added to preclude aggregating, via the class action mechanism, statutorily prescribed penalties and minimum levels of recovery.*" Br. of the N.Y. Attorney General in Support of Mot. for Permission to Appeal, at 10 (Apr. 19, 2006), reprinted at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/OAG_CA_Sperry_Brief_to_appeal.pdf (emphasis

added). As that brief further explains, "[t]he concern with excessive liability was thought to be particularly grave because 'New York statutory law contained many "penalty" and similar provisions establishing arbitrary measures of liability for noncompliance.'" *Id.* at 11 (quoting Bill Jacket, L. 1975, ch. 207, N.Y.S. Bar Association Legislation Report No. 15 at 2 (1975); emphasis omitted).

It is simply not true, thus, that § 901(b) was adopted "to achieve procedural objectives." Shady Grove Br. 40. A desire to prevent the aggregation of statutory penalties in a single lawsuit is by no stretch of the imagination a "procedural" objective. Shady Grove concludes otherwise only by reiterating its circular argument that class actions are procedural, so any limitations on class actions must be procedural. *See id.*

For all intents and purposes, § 901(b) operates as a cap on the statutory penalty that can be recovered in a class action. It would be no different if New York had specified that the maximum statutory penalty to which a defendant could be subjected in a class action was the penalty available to an individual plaintiff. Indeed, the Federal Government and many States have enacted precisely such laws capping a defendant's liability for particular claims in class actions. *See infra* App. A.

Shady Grove asserts, however, that "CPLR 901(b) is not analogous to a damages cap or a substantive limit on the amount of a defendant's liability for a statutory violation" because "[i]t does not restrict the number of times a defendant may be sued for penalties, the number of plaintiffs who may sue, or the amount of penalties each plaintiff may recover."

Shady Grove Br. 38. Again, that assertion is a *non sequitur*. Like the statutes listed in Appendix A, § 901(b) caps a defendant's liability in a particular lawsuit. It is no answer for Shady Grove to insist that the defendant may still be subjected to the same (or even greater) liability in a multiplicity of *other* lawsuits: the fact remains that § 901(b) limits the penalty that can be imposed in a particular lawsuit.

The statutes listed in Appendix A, like § 901(b), reflect a widespread legislative recognition that the aggregation of massive liability in a single class action can create an intolerable risk of overdeterrence and abuse even where the defendant could be subjected to the same or greater overall liability in multiple individual lawsuits. The incentives for filing multiple individual lawsuits, after all, are far different than the incentives for filing a single class action. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (noting "the financial incentive that class actions offer to the legal profession"); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 960 (9th Cir. 2009) (noting "considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement") (internal quotation omitted); *Hartford Accident & Indem. Co.*, 466 F.3d 1289, 1294 (11th Cir. 2006) (noting "th[e] basic truth about class action litigation: the fight over class certification is often the whole ball game" in light of plaintiffs' enhanced settlement leverage); *cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (holding that an amendment to the False Claims Act could not be applied retroactively in part because of the very different incentives for suits

brought by the U.S. Government and private *qui tam* relators). And of course the effect on a defendant of a single massive class action is different in kind than the effect of multiple individual lawsuits—the stakes (and accordingly the settlement pressure) are vastly multiplied. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995). Indeed, "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *Id.* at 1298 (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

There is a reason, after all, why this Court adopted Rule 23(f) of the Federal Rules of Civil Procedure, which authorizes interlocutory review of class certification decisions and thereby represents a departure from the ordinary rules governing appellate review: "An order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23, Advisory Committee Note (1998 Amendments). And there is a reason why Congress adopted the Class Action Fairness Act, which expanded federal jurisdiction over state-law class actions, but not over other state-law actions, *see* 28 U.S.C. § 1332(d): the settlement leverage provided by such lawsuits "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits," S. Rep. No. 109-14, at p. 20 (Feb. 28, 2005). Representative actions, in short, can impose a unique "burden" on defendants that multiple individual actions do not. *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

And, as the New York Legislature recognized by enacting § 901(b), a class action creates a *special* danger of abuse when applied to a cause of action that establishes a penalty or minimum measure of recovery unrelated to any actual injury suffered by a plaintiff. *See Sperry*, 8 N.Y.3d at 210-11. Under these circumstances, a class action creates the possibility of massive liability for a technical violation of law that did not inflict any actual injury. *See id.*; *see also Developments in the Law—Class Action*, 89 Harv. L. Rev. 1329, 1361 & n.148 (1976) ("Particularly acute problems of distortion are likely to arise where class actions are brought to enforce causes of action imposing a penalty for statutory violations. ... The increased deterrent effect class actions create may intensify the already heightened deterrent effect of a penalty provision, to a point perhaps counterproductive to statutory policies.") (citing § 901(b)). It is not surprising, thus, that New York is hardly alone in seeking to address the interplay between class actions and penalty or minimum-recovery claims by either prohibiting class actions for such claims or by limiting the recovery available to a class—the Federal Government and many other States have done likewise.[4]

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[4] *See, e.g.*, 15 U.S.C. § 1640(a)(2)(B) (Truth in Lending Act) ("[I]n the case of a class action ... no minimum recovery shall be applicable."); 15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfer Act) (same); Cal. Civ. Code § 2988.5(a)(2) ("[A]s to each member of the class no minimum recovery shall be applicable."); Colo. Rev. Stat. § 12-14.5-235(d) ("In a class action ..., the minimum damages ... do not apply."); Conn. Gen. Stat. § 36a-683(a) ("[I]n the case of a class action, ... as to each member of the class no minimum recovery shall be (cont'd ...)

Shady Grove thus errs by insisting that § 901(b) cannot be substantive because a class-action defendant could still face multiple individual actions seeking the same relief in the aggregate, and a class-action plaintiff could not recover more in a class action than in an individual action. *See, e.g.*, Shady Grove Br. 10, 31-32, 38. A statute limiting the liability that can be imposed in a class action gives the defendant a substantive right not to be subjected to liability beyond that limit in that action—even if the defendant could be subjected to liability beyond that limit in multiple individual actions. And a statute limiting a defendant's liability by rendering certain substantive claims categorically ineligible for class certification gives the defendant that same right not to be subjected to aggregated class-action liability for those claims—again, even if the

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applicable."); Haw. Rev. Stat. § 489-7.5(b)(1) ("The minimum $1,000 recovery ... shall not apply in a class action."); Ind. Code § 24-4.5-5-203(a)(2) ("[A]s to each member of the class no minimum recovery is applicable"); Ky. Rev. Stat. § 367.983(1)(c) ("In the case of a class action," a court may award "no minimum recovery as to each member"); Mass. Gen. Laws ch. 167B § 20(a)(2)(B) ("[A]s to each member of the class no minimum recovery shall be applicable."); Mich. Comp. Laws § 493.112(3)(c) ("Recovery in class actions shall be limited to actual damages," as opposed to minimum recoveries); N.M. Stat. § 58-16-15(B) ("In the case of a class action, no minimum recovery for each member of the class shall be applicable."); Ohio Rev. Code § 1351.08(A) ("[A]s to each member of the class no minimum recovery is applicable."); Okla. Stat. tit. 14A, § 5-203(1) ("[A]s to each member of the class no minimum recovery shall be applicable."); Wyo. Stat. § 40-19-119(a)(iii) ("In the case of a class action, ... no minimum recovery as to each member" shall apply).

defendant could be subjected to the same total liability in multiple individual actions. The fact that a class action is a procedural device, in short, does not mean that any limitations on liability in class actions are procedural in nature.

It does not follow, in other words, that § 901(b) cannot be deemed substantive for purposes of the Rules Enabling Act because it "does not define the rights and duties of the parties toward one another, regulate primary conduct, or deny any member of the prospective class the right to recover the damages sought in this case from Allstate." Shady Grove Br. 11. As Shady Grove recognizes elsewhere in its brief, that is not the correct test; instead, a substantive right is one "granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Shady Grove Br. 40 (internal quotation omitted). Section 901(b) protects defendants from excessive and unwarranted liability by preventing them from being subjected to aggregate statutory penalties, or aggregate minimum recoveries unrelated to any actual injury, in a single lawsuit.

Shady Grove insists, however, that an interpretation of Rule 23 that would override § 901(b) cannot violate the Rules Enabling Act in light of *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). *See* Shady Grove Br. 32. That case recognized class-action tolling for federal claims. But *American Pipe* does not speak to the relationship between Rule 23 and the Rules Enabling Act, *see* 414 U.S. at 556-59, much less support Shady Grove's argument that Rule 23 would not violate the Act if

construed to override § 901(b).[5] Indeed, that argument cannot be squared with this Court's constant admonition that courts must eschew any "adventurous" reading of Rule 23 precisely to avoid any issues under the Rules Enabling Act. *See, e.g.*, *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 617-18. Given that nothing in Rule 23 remotely purports to dictate that all causes of action litigated in federal court must be eligible for class certification under its criteria, that admonition should be the beginning and the end of the matter.

Nor does anything in New York law alter the conclusion that § 901(b) creates substantive rights

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[5] Shady Grove errs by characterizing *American Pipe* as "holding that the application of Rule 23 to toll a statute of limitations did not alter substantive rights." Shady Grove Br. 32 n.15; *see also id.* at 32 (asserting that *American Pipe* "specifically rejected the argument that interpreting Rule 23 to toll an applicable statute of limitations for all class members upon the filing of a class action complaint would violate the Rules Enabling Act"). Nothing in Rule 23 speaks to class-action tolling, and *American Pipe* did not hold otherwise. *See* 414 U.S. at 556-59. Rather, *American Pipe* "recogniz[ed] *judicial* power to toll statutes of limitations in federal courts" for federal claims. 414 U.S. at 558 (emphasis added). The *American Pipe* tolling rule, in other words, is an exercise of federal common law to fill in the interstices of federal law, not an interpretation of Rule 23. *See, e.g.*, *Wade*, 182 F.3d at 290; Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's 'Substance' and 'Procedure' in the Rules Enabling Act*, 1989 Duke L.J. 1012, 1027-28 (1989). That point makes sense: it would be odd to conclude that statutes of limitations are substantive in this context, *see, e.g.*, *Guaranty Trust*, 326 U.S. at 109-12, while the rules governing the tolling of those very statutes are not, *see, e.g.*, *Chardon v. Soto*, 462 U.S. 650, 660-62 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980).

for purposes of the Rules Enabling Act. Shady Grove first suggests that § 901(b) must be procedural for all purposes because it is located in New York's Civil Practice Law and Rules, which "'govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.'" Shady Grove Br. 34 (quoting N.Y. C.P.L.R. § 101; emphasis omitted). As noted above, however, this Court has often stressed that characterization of a given law as "substantive" or "procedural" is highly context-specific. *See, e.g.*, *Jinks*, 538 U.S. at 465; *Gasperini*, 518 U.S. at 416; *Sun Oil*, 486 U.S. at 726; *Hanna*, 380 U.S. at 471. Thus, a State's characterization of its law is by no means dispositive of the federal issue. *See, e.g.*, *Guaranty Trust*, 326 U.S. at 108. And because the New York Legislature (unlike Congress) enacts the rules governing procedure in the courts as well as substantive laws, the New York Legislature has no reason to concern itself over the placement of a particular provision in the state code.[6]

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[6] To the extent that Shady Grove relies upon N.Y. C.P.L.R. § 101 to argue that § 901(b) applies only in state court as a matter of *state* law, *see* Shady Grove Br. 35, that argument is neither correct nor properly presented here. As a threshold matter, it is simply not true that the provisions of New York's Civil Practice Law and Rules are categorically inapplicable in federal court. To the contrary, this Court held in *Gasperini* that N.Y. C.P.L.R. § 5501(c), which governs the scope of appellate review of damages awards, applies in federal court. *See* 518 U.S. at 4[illegible]. And the lower federal courts routinely apply substantive provisions of New York's Civil Practice Law and Rules, including provisions governing statutes of limitations and prejudgment interest. *See, e.g.*, *Tom Rice*

(cont'd ...)

Shady Grove proves nothing, thus, by focusing on "[§] 901(b)'s *location* as a subsection of a procedural rule defining criteria for certification of class actions." Shady Grove Br. 35 (emphasis added). As noted above, this placement in the New York statute books reflects the provision's genesis in the substantive concerns raised at the time that New York adopted its current class-action regime in 1975. Given that New York had many laws authorizing penalties or minimum recoveries, the Legislature chose to enact a single provision specifying that such remedies were categorically unavailable in class actions "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class

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Buick-Pontiac GMC Truck, Inc. v. GMC, 551 F.3d 149, 154 n.4 (2d Cir. 2008) (applying N.Y. C.P.L.R. § 214(2)); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 485-86 (6th Cir. 2007) (applying N.Y. C.P.L.R. § 5001(b)); *Van Buskirk v. New York Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003) (applying N.Y. C.P.L.R. § 215(3)); *Plitman v. Leibowitz*, 990 F. Supp. 336, 337-41 (S.D.N.Y. 1998) (applying N.Y. C.P.L.R. §§ 207, 203(g), 213(2), and 213(8)) (Sotomayor, J.).

In any event, Shady Grove never made any such state-law argument at any stage of the proceedings below, or in its petition for certiorari to this Court. Indeed, this case would not even present a federal question if § 901(b) did not apply in federal court as a matter of *state* law. *But see* Pet. 6 (asserting that the decision below "raises compelling federal questions"). Shady Grove, accordingly, is in no position to ask this Court to rule in its favor as a matter of state law, and of course this Court is not in the business of deciding cases on the basis of state law. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *The Wharf (Holdings) Ltd. v. United Int'l Holdings Inc.*, 532 U.S. 588, 596 (2001).

action." N.Y. C.P.L.R. § 901(b). The Legislature instead could have chosen to comb through the statute books and amend each and every one of the provisions that created a penalty or minimum measure of recovery—and to write itself a reminder to revisit this issue each and every time it decided to enact a penalty or minimum measure of recovery in the future. Instead, the Legislature simply chose to enact § 901(b) as a global default rule. The substantive limitation set forth in § 901(b) is no less an integral part of each substantive cause of action to which it applies than if it were embedded in each provision creating such a cause of action.

Shady Grove tries to avoid that point by arguing that "nothing in section 901(b) suggests that it is limited to rights of action based on New York state law, as opposed to federal law or the law of other states." Shady Grove Br. 35. But that argument frames things precisely backwards. The key point here is that nothing in § 901(b) suggests that it applies to causes of action *other* than those created by New York law. The background presumption, of course, is that the substantive reach of a State's law is limited to matters over which the State has a legitimate sovereign interest. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930). Indeed, as Shady Grove itself points out, "New York has no power to determine the substantive rights of litigants under federal statutes, or statutes of other states." Shady Grove Br. 36. Nothing on the face of § 901(b) remotely suggests

that the provision is anything other than a *New York* limitation on *New York* causes of action.[7]

Undeterred, Shady Grove asserts that "the New York courts have repeatedly applied section 901(b) to federal rights of actions brought in the courts of the state, based on the only permissible rationale for that result: that section 901(b) is a procedural rule." Shady Grove Br. 36. In support of that assertion, Shady Grove cites three intermediate appellate cases. But none of those cases analyzed whether (much less held that) "section 901(b) is a procedural rule" for purposes of state law, *id.*—much less for purposes of deciding whether Rule 23 could override § 901(b) consistent with the Rules Enabling Act.

The first case cited by Shady Grove, *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (App. Div. 2005), involves an unusual federal statute, the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* That statute creates a federal cause of action that may be brought in state court "'if otherwise permitted by the laws or rules of the court of a State.'" *Rudgayzer*, 799 N.Y.S.2d at 150 (quoting 47 U.S.C. § 227(b)(3)). Precisely because the statute by its express terms "provide[s] for ... private rights of action only if, and then only to the extent, permitted by state law," *Rudgayzer* applied § 901(b) to preclude a class action. *Id.* at

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[7] Indeed, the fact that § 901(b) is limited to state-law claims is implicit in the first Question Presented in this case (as framed by Shady Grove itself): "Can a state legislature properly prohibit the federal courts from using the class action device *for state law claims*?" Pet. i (emphasis added).

155. Contrary to Shady Grove's suggestion, *Rudgayzer* neither held nor hinted that § 901(b) was generally applicable to *all* federal causes of action litigated in New York state courts.

The other two New York cases on which Shady Grove relies provide, if possible, even less support for Shady Grove's position. *See Felder v. Foster*, 421 N.Y.S.2d 469 (App. Div. 1979), *app. dism'd*, 49 N.Y.2d 800 (1980); *Vickers v. Home Fed. Sav. & Loan Ass'n*, 390 N.Y.S.2d 747 (App. Div. 1977). In both cases, the state intermediate appellate court held that § 901(b) would *not* preclude a class action involving a federal claim from proceeding in state court. *Felder* concluded that punitive damages under 42 U.S.C. § 1983 "are not a 'penalty' or 'minimum measure of recovery created or imposed by statute,'" so that § 901(b) would not apply by its own terms. 421 N.Y.S.2d at 471 (quoting N.Y. C.P.L.R. § 901(b)). And *Vickers* concluded that the Truth in Lending Act, 15 U.S.C. § 1640, "'specifically authorized'" class actions to recover penalties, so that the general prohibition of § 901(b) again would not apply by its terms. 390 N.Y.S.2d at 748 (quoting N.Y. C.P.L.R. § 901(b)). Because § 901(b) would not preclude class certification in either case, neither court had any occasion to (and did not) decide whether § 901(b) was generally applicable to federal claims litigated in state court. *See Vickers*, 390 N.Y.S.2d at 748 ("We need not decide this question."); *see also* Vincent C. Alexander, *Practice Commentaries*, 7B McKinney's Consol. Laws of New York, C.P.L.R. § 901, C901:11 at 105 (2006) ("Courts have not resolved whether CPLR 901(b) can properly be invoked to block a class action in New York state court based on a federal statute that imposes a

penalty-like remedy and yet fails to expressly authorize a class action.").

At the end of the day, if the Rules Enabling Act means anything, it means that a Federal Rule of Civil Procedure cannot be interpreted to override a legislature's decision to limit liability in particular actions. Accordingly, this Court need not and should not interpret Rule 23 to override § 901(b), and thus should reject Shady Grove's argument under *Hanna* that Rule 23 governs this case.

B. The Rules of Decision Act, As Interpreted And Applied In *Erie*, Requires The Application Of § 901(b) In Federal Court.

Although Shady Grove devotes the bulk of its brief to arguing that Rule 23 governs this case under *Hanna*, it nonetheless advances a half-hearted alternative argument that "even if the Court must resort to *Erie* analysis, that analysis, too, forecloses application of the state-law rule." Shady Grove Br. 41; *see generally id.* at 41-57.[8] In particular, Shady Grove asserts that (1) § 901(b) is not "substantive" under *Erie*, *see id.* at 44-48; (2) applying § 901(b) in federal court would not serve the policies underlying

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[8] As an analytical matter, Shady Grove errs by characterizing *Hanna* as a doctrine distinct from *Erie*. *See, e.g.*, Shady Grove Br. 9 ("This case is controlled not by *Erie*, but by *Hanna v. Plumer*."); *id.* at 10 ("*Hanna* ... provide[s] a sufficient basis for resolving this case without regard to the intricacies of *Erie*."); *id.* at 44 ("Even if *Erie* rather than *Hanna* provided the correct test ...."). *Hanna* is not a separate doctrine, but simply an application of the *Erie* doctrine to "matters covered by the Federal Rules of Civil Procedure." *Gasperini*, 518 U.S. at 427 n.7; *see also Walker*, 446 U.S. at 749.

Erie, *see id.* at 48-53, and (3) applying § 901(b) in federal court would be "unworkable and unwise," *id.* at 54; *see generally id.* at 54-57. As explained below, these alternative arguments have no more merit than Shady Grove's main argument.

1. Section 901(b) Is Substantive, Not Procedural, For *Erie* Purposes.

Shady Grove first argues that § 901(b) "is procedural, not substantive" under *Erie*. Shady Grove Br. 44. Shady Grove quickly concedes, as it must, that "the category of 'substantive' rules under *Erie* is *broader* than those that create 'substantive rights' under the Rules Enabling Act." Shady Grove Br. 44 (emphasis added; citing *Hanna*, 380 U.S. at 471-72). It follows *a fortiori* that, if this Court rejects Shady Grove's argument that § 901(b) is procedural for purposes of the Rules Enabling Act, then this Court should reject Shady Grove's argument that § 901(b) is procedural for *Erie* purposes.

And this Court should indeed reject that argument, for all of the reasons described in Part A.2 above. Like a statutory cap on damages, § 901(b) limits a defendant's potential liability in a particular lawsuit. If anything, the analogy to a statutory cap on damages is even stronger here than in *Gasperini*, where that analogy proved decisive. *See* 518 U.S. at 429. The New York statute at issue in *Gasperini*, N.Y. C.P.L.R. § 5501(c), governed the standard of judicial review of an award of money damages, and required the reviewing court to assess whether such an award "'deviates materially from what would be reasonable compensation.'" 518 U.S. at 423 n.4 (quoting § 5501(c)). *Gasperini* held that this standard of judicial review, which is more searching

than the standard generally applicable in federal court, nonetheless applied in federal court because "it was designed to provide an analogous control" to a cap on damages. *Id.* at 429; *see also id.* ("[N.Y. C.P.L.R.] § 5501(c) contains a procedural instruction, but the State's objective is manifestly substantive.").

If a heightened standard of judicial review of damages awards is sufficiently analogous to a statutory cap to qualify as substantive under *Erie*, it follows that a categorical ban on class actions for particular claims is also sufficiently analogous to a statutory cap to qualify as substantive under *Erie*. Heightened judicial review simply increases the likelihood that excessive damages will not be awarded in a particular case; a categorical ban on class actions for certain claims ensures that a defendant's maximum liability for those claims in a particular case is the amount that an individual (as opposed to a class) may recover. Shady Grove makes no real attempt to deal with *Gasperini*, other than to observe in a footnote that the heightened standard of judicial review at issue in that case "was deemed by the Court to be substantive" by analogy to a cap on damages. Shady Grove Br. 38 n.17.

Shady Grove thus misses the point by insisting that § 901(b) must be characterized as procedural for *Erie* purposes because it is not "aimed at regulating 'primary conduct'—that is, the way people behave out of court." Shady Grove Br. 46. This Court has never limited *Erie* to state laws that regulate "primary conduct," and indeed, has consistently applied state laws in federal court that do *not* regulate "primary conduct." *See, e.g.*, *Gasperini*, 518 U.S. at 429 (applying state statute governing judicial

review of awards of money damages); *Walker*, 446 U.S. at 749-51 (applying state statute governing when a lawsuit is commenced for statute of limitations purposes); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949) (same); *Guaranty Trust*, 326 U.S. at 109-10 (applying state statute of limitations); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (applying state statute governing the burden of proving a defense in court).

At the end of the day, Shady Grove's insistence that "[t]he state rule here does not ... define substantive rights," Shady Grove Br. 46, simply ignores the fact that § 901(b) effectively limits the penalty to which a defendant may be subjected in a particular lawsuit. Just as the Federal Government and many States have capped a defendant's liability for particular claims in class actions, *see infra* App. A, many States (like New York) have achieved that same goal by specifying that particular claims are categorically ineligible for class certification in the first place, *see infra* App. B. For *Erie* purposes, there is simply no basis for distinguishing between these two methods of achieving the same goal.

Indeed, if anything, the statutes listed in Appendix B only underscore that the New York statute at issue here is not some fluky anomaly, but simply one manifestation of a much broader recognition that class actions can present a particular risk of excessive liability and abuse. In deciding whether to create a particular cause of action (or a particular remedy, like a penalty or minimum measure of recovery), a State need not face a Hobson's choice between doing nothing or allowing recovery on a classwide basis. Rather, the State may

decide to create a particular cause of action (or a particular remedy) but specify that it may not be pursued on a classwide basis.

As Appendix B underscores, many States have made just such a decision that certain claims are categorically ineligible for class certification. For example, just this year, Texas created two innovative causes of action, but specified that they are categorically ineligible for class certification. *See* Tex. Bus. & Com. Code Ann. § 321.109 (effective Apr. 1, 2009) (for claims involving abuse of e-mail, "[a] court may not certify an action brought under this section as a class action"); Tex. Bus. & Com. Code Ann. § 502.002(f) (effective Apr. 1, 2009) (for claims involving misuse of credit card information, "[a] court may not certify an action brought under this section as a class action"). The Rules of Decision Act, as interpreted and applied in *Erie*, requires federal courts to enforce, not thwart, those substantive decisions.

Thus, as the Second Circuit recognized below, § 901(b) is "a substantive rule the eliminates statutory penalties under New York law as a remedy for class action plaintiffs." Pet. App. 11-12a. That straightforward point answers all three of the Questions Presented in Shady Grove's petition for certiorari. The answer to the first Question Presented—*i.e.*, "Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?," Pet. i—is yes, at least where (as here) the prohibition reflects a substantive state policy applicable in both state and federal court. The answer to the second Question Presented—*i.e.*, "Can state legislatures dictate

procedure in the federal courts?," Pet. i—is that statutes rendering certain state-law causes of action categorically ineligible for class certification, like § 901(b), represent a substantive state policy choice, not an attempt to "dictate procedure in the federal courts," *id.* And the answer to the third Question Presented—*i.e.*, "Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?," Pet. i—is that this is no proper concern of the federal courts. If States decide to limit liability under substantive state law by declaring certain causes of action categorically ineligible for class certification, that is their own business. Just as States are not constrained to create particular causes of action or remedies in the first place, they are not constrained to create causes of action or remedies eligible for pursuit on a classwide basis.

2. Applying § 901(b) In Federal Court Would Serve The Policies Underlying *Erie*.

Shady Grove next argues that applying § 901(b) in federal court would not address "*Erie*'s concerns about fairness and 'forum-shopping.'" Shady Grove Br. 48 (capitalization modified). While Shady Grove is correct to recognize that promoting fairness (or, put differently, "avoidance of inequitable administration of the laws") and preventing forum shopping are the touchstones for proper application of *Erie*, *see, e.g.*, *Gasperini*, 518 U.S. at 428; *Hanna*, 380 U.S. at 467-68 & n.9, Shady Grove is incorrect to suggest that these considerations warrant a refusal to apply § 901(b) in federal court.

(a) Fairness

With regard to fairness, Shady Grove does not have much to say. *See* Shady Grove Br. 48. Rather, Shady Grove simply asserts that "the fundamental unfairness that drove the Court's decision in *Erie*" was that the substantive law governing a particular claim should not be different in federal and state court. *Id.* That assertion, needless to say, begs the question whether § 901(b) is substantive or procedural in the first place, which is the question that considerations of fairness are supposed to inform. *See, e.g.*, *Gasperini*, 518 U.S. at 428; *Hanna*, 380 U.S. at 467-68 & n.9.

As this Court explained in *Hanna*, "[t]he *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court." 380 U.S. at 467. Were this Court to hold that § 901(b) does not apply in federal court, there is no question that "the character of result of a litigation materially [would] differ because the suit had been brought in a federal court," *id.*: this litigation could give rise to massive class-action penalty damages under state law in federal court, but not in state court. Thus, while plaintiffs have conceded that they could recover no more than $500 in state court, *see* Pet. App. 4a, they are seeking to recover more than $5 million in federal court, *see* JA7 (invoking federal jurisdiction under 28 U.S.C. § 1332(d)(2)(A)).

Allowing such "'substantial variations between state and federal money judgments,'" *Gasperini*, 518 U.S. at 430 (quoting *Hanna*, 380 U.S. at 467-68; brackets omitted), obviously would be unfair to the

defendant. Indeed, as described in Part A.2 above, the whole point of § 901(b) in the first place was to prevent the aggregation of individual penalty claims of relatively modest value into a mammoth class action that would threaten a defendant with vast liability. If *Erie* means anything, it means that a plaintiff should not be able to turn a $500 case into a $5 million case by simply walking across the street from state to federal court. *See, e.g., Gasperini*, 518 U.S. at 431 ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."). There can be no serious question, then, that an interest in "avoidance of inequitable administration of the laws," *id.* at 428 (quoting *Hanna*, 380 U.S. at 468), strongly favors the application of § 901(b) in this case.

(b) Forum shopping

With respect to forum shopping, Shady Grove cannot and does not deny that its position would create obvious and powerful incentives for plaintiffs to file claims in federal court that are categorically ineligible for class certification in state court. As the Second Circuit put it, "[a] failure to apply CPLR 901(b) would clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the substantial advantages of class actions." Pet. App. 16a (internal quotation omitted). Shady Grove insists, however, that Congress blessed such forum shopping in CAFA. *See* Shady Grove Br. 49-53 & n.27. According to Shady Grove, "any judicial antipathy to litigants' forum preferences in these circumstances must yield to the

contrary policy expressed by Congress in enacting [CAFA]." *Id.* at 49.

That argument is baseless. CAFA amended the diversity statute to extend federal-court jurisdiction over state-law class actions. *See* 28 U.S.C. § 1332(d); S. Rep. No. 109-14 at p. 5 (Feb. 28, 2005) ("[CAFA] corrects a flaw in the current diversity jurisdiction statute (28 U.S.C. § 1332) that prevents most interstate class actions from being adjudicated in federal courts."). But CAFA did not alter the application of the *Erie* doctrine in cases within its reach: "the Act does not change the application of the *Erie* Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction." S. Rep. No. 109-14, at 49 (2005); *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1528-30 (2008).

Thus, although Shady Grove accuses Allstate of seeking to "turn CAFA on its head," Shady Grove Br. 56, just the opposite is true. CAFA both assumes and presupposes that a plaintiff could bring a particular class action in state court, and does not remotely purport to authorize the federal courts to override state statutes rendering particular state-law claims categorically ineligible for class certification. To the contrary, and this is of course the irony in Shady Grove's position, CAFA was motivated by the same general concerns over abusive class actions that motivated such statutes. *See, e.g.*, *Bell v. Hershey Co.*, 557 F.3d 953, 957 (8th Cir. 2009); *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-08 (6th Cir. 2009).

Shady Grove thus misses the point by arguing that "CAFA ... reflects a congressional policy to enable both class plaintiffs and defendants to choose a federal forum based explicitly on a preference for application of *federal class certification standards*." Shady Grove Br. 52 (emphasis added); *see also id.* at 53 (noting "[t]he congressional policy, reflected in CAFA, of encouraging federal jurisdiction over class actions because of the perceived superiority of *federal certification standards*") (emphasis added). The key point here, once again, is that a state statute rendering particular claims categorically ineligible for class certification in no way affects federal "certification standards." *Id.* With respect to claims that are eligible for class certification, federal courts can and must continue to apply those standards as always. But federal courts cannot apply those standards to causes of action that are categorically ineligible for class certification in the first place.

Thus, Shady Grove once again begs the question by asserting that *Erie* concerns "have never been aimed at forum choices that are driven by a preference for superior rules of federal practice and procedure." Shady Grove Br. 11; *see also id.* at 48-53. The question here is whether § 901(b) is properly classified as procedural or substantive for *Erie* purposes in the first place. Given that a refusal to apply § 901(b) in federal court would undeniably promote and reward forum shopping, and would transform a $500 case into a $5 million case, the provision is properly characterized as substantive for *Erie* purposes.

3. Applying § 901(b) In Federal Court Would Not Create Problems.

Shady Grove finally argues that applying § 901(b) in federal court would "generate a host of negative consequences." Shady Grove Br. 54. Again, that argument is incorrect.

First, Shady Grove asserts that applying § 901(b) in federal court would deprive the federal courts of their "inherent authority to govern their own procedures." Shady Grove Br. 54; *see also id.* at 11 (same). The short answer to that assertion is that the federal courts have no "inherent authority" to certify a class outside the framework of Rule 23. Because Rule 23 does not authorize the federal courts to certify a class to pursue a cause of action that is categorically ineligible for class certification, *see supra* Part A.1, the federal courts have no "inherent authority" to do the same thing. A federal court's inherent powers are not a license to override or ignore otherwise applicable law. *See, e.g.*, *Carlisle v. United States*, 517 U.S. 416, 426-28 (1996).

Shady Grove's *amicus* Public Justice goes even one step further by describing class actions as an "'*essential* characteristic' of the federal judicial system," akin to the right to trial by jury, that cannot be displaced by the operation of state law. Public Justice *Amicus* Br. 21 (emphasis added; quoting *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958)). That argument is far-fetched at best. As this Court has emphasized time and again, class actions represent "'an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 155 (1982) (emphasis

added; quoting *Califano*, 442 U.S. at 700-01); *see also Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (noting the "deep-rooted historic tradition that everyone should have his own day in court"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (same); *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (same); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (same); *Phillips*, 472 U.S. at 808 (same); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (same). Representative litigation raises due process concerns of the first order, which is why federal courts must engage in a "rigorous analysis" of Rule 23's class certification criteria before certifying a class. *Falcon*, 457 U.S. at 161; *see also East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (emphasizing that "careful attention" to the criteria of Rule 23 is "indispensable"). Indeed, modern class action practice did not arrive in the federal courts until the substantial overhaul of Rule 23 in 1966. *See Amchem*, 521 U.S. at 614-18. Any suggestion that this practice is an "essential characteristic" of federal-court litigation akin to the right to trial by jury is thus fanciful.

Shady Grove insists, however, that the application of state statutes rendering certain causes of action categorically ineligible for class certification would impermissibly "deprive" federal courts of their ability to "allocate resources and manage matters before them." Shady Grove Br. 54. To the extent that Shady Grove thereby means to suggest that States could flood the federal courts with small claims that could not efficiently be managed on an individual basis, that suggestion is incorrect. Small claims arising under state law, after all, generally do not fall within federal jurisdiction. Indeed, Shady

Grove's suggestion is ironic, because (as this case shows) one way that small claims arising under state law can reach federal court is via a class action covered by CAFA. If a multiplicity of such small claims cannot be pursued as a class action in federal court, the upshot is that they will be *dismissed* from federal court, not pursued as individual claims in federal court. *See, e.g.*, Pet. App. 34a. Allowing a class action to proceed under these circumstances, in short, would *increase*, not *decrease*, the federal courts' workload.[9]

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[9] Shady Grove errs by asserting that States that have not affirmatively authorized class actions in their own courts (like Mississippi and Virginia) have thereby "eliminat[ed] class actions ... across the board." Shady Grove Br. 54. By that assertion, Shady Grove apparently means to suggest that the upshot of Allstate's position is that all claims arising under Mississippi or Virginia law are categorically ineligible for class certification in federal as well as state court. That suggestion is incorrect: the *absence* of any authorization for class actions under state law is not the same thing as an affirmative *prohibition* on class actions under state law. *See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.*, 241 F.R.D. 77, 83-84 (D. Me. 2007), *vacated on other grounds*, 522 F.3d 6 (1st Cir. 2008). Under the Rules of Decision Act, the absence of state law on a particular issue is not a state law that can be applied in federal court, so that *Erie* presents no barrier to the certification of claims arising under Mississippi and Virginia law in federal court. *See, e.g., Ayers v. Thompson*, 358 F.3d 356, 375-76 (5th Cir. 2004); *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 777 (5th Cir. 2001); *see generally* 7A *Federal Practice & Procedure* § 1758 at 118 ("The *Hanna* decision resolves any doubt as to the availability of a class action in a federal court under Rule 23 in a diversity action, even in a state that does not recognize the procedure."). Indeed, although Mississippi does not authorize class actions in its own courts, it has enacted targeted statutes rendering certain state-

(cont'd ...)

Second, Shady Grove argues that the application of § 901(b) in federal court would require the application of "state class action *standards*" in federal court, and thereby "plunge [federal courts] heavily into the business of certifying classes under state procedural standards." Shady Grove Br. 12, 57 (emphasis added). As explained in Part A.2 above, that argument is a red herring. Rule 23 sets forth the federal class certification criteria, which apply to all claims eligible for class certification in federal court. *See, e.g.*, *Katrina*, 2009 WL 1707923, at *5, *recon. denied*, 2009 WL 2447846, at *3-5; *cf. Hanna*, 380 U.S. at 473-74. No one here is arguing that state class certification criteria apply in federal court.[10]

At the end of the day, Shady Grove has neither a legal argument nor a policy argument against applying § 901(b) in federal court. That provision has nothing to do with the procedural criteria for class certification (which, in federal court, are set

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law causes of action categorically ineligible for class certification, *see, e.g.*, Miss. Code § 41-67-28(3)(b); Miss. Code § 75-24-15(4), presumably recognizing that these causes of action otherwise might be subject to class certification in federal court.

[10] Shady Grove also errs by arguing that "if state law governs the circumstances under which claims may be aggregated under Rule 23, it would presumably also displace other federal rules addressing similar topics, such as joinder and intervention." Shady Grove Br. 55-56. As explained in the text, this case involves no "displace[ment]" of any Federal Rule; just as the criteria for class certification in federal court would continue to be governed by Rule 23, the criteria for joinder and intervention in federal court would continue to be governed by Federal Rules 18 through 22 and 24.

forth in Rule 23); rather, it represents a substantive policy choice to limit the liability that can be imposed in a particular lawsuit. The Rules of Decision Act requires federal courts to respect that substantive policy choice. Were the law otherwise, litigants could evade § 901(b) by filing in federal rather than state court. Nothing in federal law either requires or permits such evasion.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
620 Eighth Ave., 32d fl.
New York, NY 10018
(212) 218-5554

CHRISTOPHER LANDAU, P.C.
Counsel of Record
BRITT C. GRANT
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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APPENDICES

APPENDIX A

Representative Federal and State Statutes Limiting the Remedy Available in a Class Action

Federal:

12 U.S.C. § 2605(f) (Real Estate Settlement Procedures Act) ("Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts: ... In the case of a class action, an amount equal to the sum of—(A) any actual damages to each of the borrowers in the class as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of—(i) $500,000; or (ii) 1 percent of the net worth of the servicer.");

12 U.S.C. § 4010(a) (Expedited Fund Availability Act) ("[A]ny depository institution which fails to comply with any requirement imposed under this chapter ... with respect to any person ... is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure; (2) ... (B) in the case of a class action, such amount as the court may allow, except that—(i) as to each

member of the class, no minimum recovery shall be applicable; and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution involved.");

12 U.S.C. § 4907(a) (Homeowners Protection Act) ("Any servicer, mortgagee, or mortgage insurer that violates a provision of this chapter shall be liable to each mortgagor to whom the violation relates for—... (2) ... (B) in the case of a class action—(i) in which the liable party is subject to section 4909 of this title, such amount as the court may allow, except that the total recovery under this subparagraph in any class action or series of class actions arising out of the same violation by the same liable party shall not exceed the lesser of $500,000 or 1 percent of the net worth of the liable party, as determined by the court; and (ii) in which the liable party is not subject to section 4909 of this title, such amount as the court may allow, not to exceed $1,000 as to each member of the class, except that the total recovery under this subparagraph in any class action or series of class actions arising out of the same violation by the same liable party shall not exceed the lesser of $500,000 or 1 percent of the gross revenues of the liable party, as determined by the court.");

15 U.S.C. § 1640(a) (Truth in Lending Act) ("[A]ny creditor who fails to comply with any requirement imposed under this part ... with respect to any person is liable to such person in an amount equal to sum of—(1) any actual damage sustained by such person as a result of the failure; ... (2)(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor.");

15 U.S.C. § 1691e(b) (Equal Credit Opportunity Act) ("Any creditor, ... who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor.");

15 U.S.C. § 1692k(a) (Fair Debt Collection Practices Act) ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—(1) any actual damage sustained

by such person as a result of such failure; (2) ... (B) in the case of a class action, ... (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector.");

15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfer Act) ("[A]ny person who fails to comply with any provision of this subchapter with respect to any consumer, ... is liable to such consumer in an amount equal to the sum of—(1) any actual damage sustained by such consumer as a result of such failure; (2) ...(B) in the case of a class action, such amount as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant.");

29 U.S.C. § 1854(c)(1) (Migrant and Seasonal Worker Protection Act) ("If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that ... if such complaint is certified as a

class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.").

California:

Cal. Civ. Code § 1787.3(b) ("Any creditor ... who fails to comply with any requirement imposed under this title [of the California Credit Denial Disclosure Act] shall be liable to the aggrieved applicant for punitive damages in an amount not greater than ten thousand dollars ($10,000), in addition to any actual damages provided in subdivision (a), except that in the case of a class action the total recovery under this subdivision shall not exceed the lesser of five hundred thousand dollars ($500,000) or 1 percent of the net worth of the creditor.");

Cal. Civ. Code § 2988.5(a) ("[A]ny lessor who fails to comply with any requirement imposed under [the California Vehicle Leasing Act] for which no specific relief is provided with respect to any person shall be liable to such person in an amount equal to the sum of ... in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of five hundred thousand dollars ($500,000) or 1 percent of the net worth of the lessor.");

Cal. Civ. Code § 1812.31(c) ("[W]hoever [discriminates on the basis of sex in

providing credit] may be liable for punitive damages in the case of a class action in such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not exceed the lesser of one hundred thousand dollars ($100,000) or one percent (1%) of the net worth of the creditor.");

Cal. Health & Safety Code § 18036.5(c) ("With respect to a violation [of the California Manufactured Housing Act of 1980] which is not corrected ..., the seller shall be liable to the buyer in an amount equal to the sum of ... In the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same seller shall not be more than the lesser of five hundred thousand dollars ($500,000) or 1 per cent of the net worth of the seller.");

Cal. Fin. Code § 866.4 ("[A]ny depository institution which fails to comply with any requirement imposed pursuant to this article [of the California Banking Law] shall be liable to the aggrieved party in an amount equal to the sum of any actual damage sustained by the person as a result of the failure; and, ... in the case of a class action, such amount as the court may allow, except that as to each member of the class no

minimum recovery shall be applicable, and the total recovery in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of five hundred thousand dollars ($500,000) or 1 percentum of the net worth of the depository institution.").

Colorado:

Colo. Rev. Stat. § 6-1-113(2) ("Except in a class action ... any person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in this article [of the Colorado Consumer Protection Act] shall be liable in an amount equal to the sum of: (a) The greater of: (I) The amount of actual damages sustained; or (II) Five hundred dollars; or (III) Three times the amount of actual damages sustained, if it is established by clear and convincing evidence that such person engaged in bad faith conduct; plus (b) In the case of any successful action to enforce said liability, the costs of the action together with reasonable attorney fees as determined by the court.");

Colo. Rev. Stat. § 12-14-113(1) ("[A]ny debt collector or collection agency who fails to comply with any provision of this article [of the Colorado Fair Debt Collection Practices Act] ... with respect to a consumer is liable to such consumer in an amount equal to the sum of ... (a) Any actual damage sustained by such consumer as a result of such failure;

(b)(I) In the case of any action by an individual, such additional damages as the court may allow, but not to exceed one thousand dollars; (II) In the case of a class action, such amount for each named plaintiff as could be recovered under subparagraph (I) of this paragraph (b) and such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed five hundred thousand dollars or one percent of the net worth of the debt collector or collection agency, whichever is the lesser.");

Colo. Rev. Stat. § 12-14.5-235(d) ("In a class action, ... the minimum damages provided in ... this section [of the Colorado Uniform Debt-Management Services Act] do not apply.").

Connecticut:

Conn. Gen. Stat. § 36a-683(a) ("[A]ny creditor who fails to comply with any requirement of [the Connecticut Truth-In-Lending Act] ... with respect to any person is liable to that person in an amount equal to the sum of (1) any actual damage sustained by such person as a result of the failure; ... (2)(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of five hundred

thousand dollars or one per cent of the net worth of the creditor.").

Hawaii:

Haw. Rev. Stat. § 480-13(c)(1) ("The minimum $1,000 recovery provided [for violation of Hawaii antitrust law] shall not apply in a class action or a de facto class action lawsuit.");

Haw. Rev. Stat. § 487A-1(b) ("The total class action penalty against any creditor, seller, or lessor shall not exceed $10,000 in any class action or series of class actions arising out of the use by a creditor, seller, or lessor of an agreement which fails to comply with [Hawaii law requiring plain language in consumer transactions].");

Haw. Rev. Stat. § 489-7.5(b)(1) ("The minimum $1,000 recovery provided [for violation of the Hawaii law against discrimination in public accommodations] shall not apply in a class action or a de facto class action lawsuit.").

Idaho:

Idaho Code § 48-608(1) ("[I]n the case of a class action [under the Idaho Consumer Protection Act], the class may bring an action for actual damages or a total for the class that may not exceed one thousand dollars ($1,000), whichever is the greater.");

Idaho Code § 63-4011(1)(b)(ii) ("In the case of a class action" under an Idaho tax statute, the defendant's liability is "not to exceed five hundred thousand dollars ($500,000).").

Indiana:

> Ind. Code § 9-23-2.5-10(c) ("The total recovery of damages, penalties, and fees in a class action civil suit brought [against a retail lessor failing to comply with Indiana disclosure requirements for motor vehicle leases] may not exceed one hundred thousand dollars ($100,000).");
>
> Ind. Code § 24-4.5-5-203 ("[A] creditor who ... fails to disclose information to a person entitled to the information under [the loan and credit sales provisions of the Indiana Uniform Consumer Credit Code] is liable to that person in an amount equal to the sum of ... (a) the following: ... (2) in the case of a class action, an amount the court allows, except that as to each member of the class no minimum recovery is applicable, and the total recovery under this subdivision in any class action or series of class actions arising out of the same failure to comply by the same creditor may not be more than the lesser of: (i) five hundred thousand dollars ($500,000); or (ii) one percent (1%) of the net worth of the creditor.").

Kentucky:

> Ky. Rev. Stat. § 367.983(1)(c) ("A lessor who fails to comply with a requirement imposed [under Kentucky law regulating rental-purchase agreements] with respect to a consumer shall be liable to the consumer in an amount equal to the greater of: ... (a) The actual damages sustained by the consumer as a result of the violation, plus the costs of

the action and reasonable attorneys' fees; ... (c) In the case of a class action, the amount the court determines to be appropriate with no minimum recovery as to each member, plus the costs of the action and reasonable attorneys' fees. The total recovery in any class action or series of class actions arising out of the same violation shall not be more than the lesser of five hundred thousand dollars ($500,000), plus the costs of the action and reasonable attorneys' fees or one percent (1%) of the net worth of the lessor.").

Maine:

Me. Rev. Stat. § 11054(1) ("[A]ny debt collector who fails to comply with any provisions of [the Maine Fair Debt Collection Practices Act] with respect to any person is liable to that person in an amount equal to the sum of: ... A. Any actual damage sustained by that person as a result of such failure; ... C. In the case of a class action: (1) Such amount for each named plaintiff as may be recovered under paragraph A; and (2) Such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1% of the net worth of the debt collector.").

Maryland:

Md. Com. Law § 12-707(c) ("[A]ny creditor who fails to comply with any requirement imposed under [the Maryland Equal Credit Opportunity Act] may be liable for punitive damages in the case of a class action in such

amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not exceed the lesser of $100,000 or 1 percent of the net worth of the creditor.").

Massachusetts:

Mass. Gen. Laws ch. 140D § 32(a) ("[A]ny creditor who fails to comply with any requirement imposed under [the Massachusetts Consumer Credit Cost Disclosure Act] ... with respect to any person is liable to such person in an amount equal to the sum of: (1) Any actual damage sustained by such person as a result of the failure; (2) ... (b) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable and the total recovery under this subclause in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of five hundred thousand dollars or one per centum of the net worth of the creditor.");

Mass. Gen. Laws ch. 167B § 20(a) ("[A]ny person who fails to comply with any provision of this chapter [of Massachusetts law governing electronic funds transfers] with respect to any consumer, ... is liable to such consumer in an amount equal to the sum of: (1) any actual damage sustained by such consumer as a result of such failure; ... (2) ... (B) in the case of a class action, such amount

as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of five hundred thousand dollars or one per centum of the net worth of the defendant.").

Michigan:

Mich. Comp. Laws § 493.112(c) ("Recovery in class actions [under the Michigan statute governing credit card transactions and agreements] shall be limited to actual damages without attorneys' fees and the cost of bringing the action.").

Montana:

Mont. Code § 30-14-1112(4) ("In a class action brought under [the Montana Plain Language in Contracts Act], the seller, lessor, or lender is liable ... for not more than $10,000 plus actual damages.").

New Jersey:

N.J. Stat § 34:11B-11 ("[I]n the case of a class action [under the New Jersey Family Leave Act] ... the total amount of punitive damages shall not exceed $500,000.00 or 1% of the net worth of the defendant, whichever is less.");

N.J. Stat § 56:12-4 ("Class actions may be brought under the provisions of [the New Jersey Truth in Consumer Contract, Warranty, and Notice Act], but the amount of

punitive damages shall be limited to $10,000.00 against any one seller, lessor, insurer or creditor and the amount of attorney's fees may not exceed $10,000.00.").

New Mexico:

N.M. Stat. § 58-16-15(B) ("In the case of a class action [under the New Mexico Remote Financial Service Unit Act], no minimum recovery for each member of the class shall be applicable and the total recovery in any such action is limited to the actual damages sustained by the members of the class but shall not exceed the lesser of one hundred thousand dollars ($100,000) or one percent of the net worth of the defendant.").

Ohio:

Ohio Rev. Code § 1351.08(A) ("A lessor who fails to comply with the requirements of [Ohio law] with respect to a lease-purchase agreement is liable to the lessee in an amount equal to ... [t]he greater of the following: (a) The actual damages sustained by the lessee as a result of the failure of the lessor; (b) ... (ii) In the case of a class action, an amount the court determines to be appropriate except that as to each member of the class no minimum recovery is applicable. The total recovery under division (A)(2)(b)(ii) of this section in any class action or series of class actions arising out of the same failure to comply cannot be more than the lesser of five hundred thousand dollars or an amount equal to one per cent of the net worth of the lessor.").

Oklahoma:

Okla. Stat. tit. 14A, § 5-203(1) ("[A]ny creditor who fails to comply with any requirement imposed by the [disclosure provisions of the Oklahoma Consumer Credit Code] with respect to any person is liable to that person in an amount equal to the sum of: (a) any actual damage sustained by that person as a result of the failure; (b) ... (ii) in the case of a class action, an amount the court may allow, except that as to each member of the class no minimum recovery shall be applicable and the total recovery other than for actual damages in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of Five Hundred Thousand Dollars ($500,000.00) or one percent (1%) of the net worth of the creditor.");

Okla. Stat. tit. 59, § 1955(A) ("A consumer damaged by a violation of [the Oklahoma Rental-Purchase Act] by a lessor is entitled to recover from the lessor: 1. Actual damages; 2. Twenty-five percent (25%) of an amount equal to the total amount of payments required to obtain ownership of the merchandise involved, except that the amount recovered under this section shall not be less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), or in the case of a class action, an amount the court may allow, except that as to each member of the class no

minimum recovery may be applicable and the total recovery other than for actual damages in any class action or series of class actions arising out of the same failure to comply by the same lessor shall not be more than the lesser of Five Hundred Thousand Dollars ($500,000.00) or one percent (1%) of the net worth of the lessor.").

Pennsylvania:

42 Pa. Cons. Stat. § 6909(b) ("[I]n any class action brought for violation of [the Pennsylvania Rental-Purchase Agreement Act], the total recovery arising out of the same failure to comply shall not be more than the lesser of $500,000 or an amount equal to 1% of the net worth of the lessor.");

69 Pa. Stat. § 1902(d) ("The total class action penalty against any ... financing agency or retail seller shall not exceed ten thousand dollars ($10,000) in any class action or series of class actions arising out of the use by a financing agency or retail seller of a form of confirmation which fails to comply with [certain of the buyer-confirmation provisions of the Pennsylvania Goods and Services Installment Sales Act].").

Rhode Island:

R.I. Gen. Laws § 19-14.9-13(2) ("Any debt collector who fails to comply with [the Rhode Island Fair Debt Collection Practices Act] with respect to a consumer ... shall be civilly liable to such consumer in an amount equal to the sum of: (a) Any actual damages

sustained by such consumer as a result of such failure; ... (c) In the case of a class action: (1) Such amount for each named plaintiff as could be recovered under paragraph (b) of this subsection; (2) Such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed five hundred thousand dollars ($500,000) or one percent of the net worth of the debt collector, whichever is the lesser.").

Tennessee:

Tenn. Code § 47-18-611(a)(1) ("A lessor who fails to comply with a requirement imposed in [the Tennessee Rental-Purchase Agreement Act] with respect to a consumer is liable to the consumer in an amount equal to the greater of: (A) The actual damages sustained by the customer as a result of the violation; or (B) ... (ii) In the case of a class action, the amount the court determines to be appropriate with no minimum recovery as to each member. The total recovery in any class action or series of class actions arising out of the same violation may not be more than the lesser of five hundred thousand dollars ($500,000) or one percent (1%) of the net worth of the lessor.");

Tenn. Code § 47-18-803 ("Any creditor or credit card issuer who discriminates against any individual in a manner prohibited by [the Tennessee Equal Consumer Credit Act] is liable to such individual in damages in an amount equal to the sum of: ... [i]n the case

of a class action, not more than ten thousand dollars ($10,000).").

Texas:

Tex. Fin. Code § 349.403(d) ("A minimum recovery is not applicable to a class member [suing under Texas law governing loans and financed transactions]. The total recovery ... in a class action or series of class actions arising out of the same violation of this subtitle by the same person may not exceed the lesser of $100,000 or five percent of the net worth of the person.").

Utah:

Utah Code § 13-11-19(2) ("A consumer who suffers loss as a result of a violation of this chapter [of the Utah Consumer Sales Practices Act] may recover, but not in a class action, actual damages or $2,000, whichever is greater .... A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter.").

Wyoming:

Wyo. Stat. § 40-19-119(a) ("A merchant who fails to comply with a requirement imposed in [the Wyoming Consumer Rental Purchase Agreement Act] shall be liable to the consumer damaged thereby in an amount equal to the greater of: (i) The actual damages sustained by the consumer as a result of the violation, plus the costs of the action and reasonable attorney's fees; ... or

(iii) In the case of a class action, the amount the court determines to be appropriate with no minimum recovery as to each member, plus the costs of the action and reasonable attorney's fees. The total recovery in any class action or series of class actions arising out of the same violation shall not be more than the lesser of five hundred thousand dollars ($500,000.00) plus the costs of the action and reasonable attorney's fees or one percent (1%) of the net worth of the merchant plus the costs of the action and reasonable attorney's fees.").

APPENDIX B

Representative State Statutes Prohibiting Class Actions For Particular Claims

Arizona:

> Ariz. Rev. Stat. § 33-712(C) ("Any action to enforce the provisions of this section [requiring the acknowledgment of a mortgage's satisfaction or the recording of a deed of release], including any action to recover amounts due under this section, shall be brought and maintained in the individual names of, and shall be prosecuted by, persons entitled to recover under the terms thereof, and not in a representative capacity or otherwise.").

Arkansas:

> Ark. Code § 4-87-103 ("No class action may be filed under the provisions of [the Arkansas Equal Consumer Credit Act]").

Connecticut:

> Conn. Gen. Stat. § 36a-740 ("No class action shall be permitted pursuant to the provisions of this section [of the Connecticut Home Mortgage Disclosure Act].");
>
> Conn. Gen. Stat. § 42-155(c) ("No class action may be brought under this chapter [requiring the use of plain language in consumer contracts].").

Florida:

> Fla. Stat. § 282.5004(7) ("A class action may not be maintained in this state: (a) Against a

governmental agency for damages caused by the failure of its information technology products to be year 2000 compliant. (b) Against a business for damages caused by the failure of its information technology products to be year 2000 compliant, unless each member of the class has suffered direct economic damages in excess of $50,000.");

Fla. Stat. § 624.155(6) ("This section [of the Florida Insurance Code] shall not be construed to authorize a class action suit against an authorized insurer ....");

Fla. Stat. § 634.433(4) ("This section [of the Florida Service Warranty Association Act] shall not be construed to authorize a class action suit against a service warranty association or a civil action against the department, the office, their employees, or the Chief Financial Officer.");

Fla. Stat. § 634.3284(4) ("This section [of the Florida Home Warranty Association Act] shall not be construed to authorize a class action suit against a home warranty association or a civil action against the department or office or their employees or the Chief Financial Officer.");

Fla. Stat. § 642.0475(4) ("This section [of the Florida Legal Expense Insurance Act] shall not be construed to authorize a class action suit against a legal expense insurance corporation or a civil action against the department, commission, or office or their employees.");

Georgia:

Ga. Code § 7-3-29(e) ("A claim of violation of this chapter [of the Georgia Industrial Loan Act] against a duly licensed lender may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 7-4-5(b) ("Such liability [for failure to comply with certain federal loan provisions referenced in Georgia interest and usury law] may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 7-4-21 ("A claim of violation [of certain Georgia interest and usury provisions] on any loan secured by an interest in real estate may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 7-6-2 ("Any person denied a loan or credit solely on the basis of discrimination because of sex, race, religion, national origin, or marital status shall have a right to bring an action for damages in any court of competent jurisdiction in an individual, but not in a representative, capacity against the person, firm, or corporation violating this chapter.");

Ga. Code § 10-1-36.1(a) ("A claim of violation [of the Georgia Motor Vehicle Sales Finance Act] on any loan or contract secured by an interest in a motor vehicle may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 10-1-255(c) ("A claim for damages for violation of this article [of the Georgia Below Cost Sales Act] may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 10-1-399(a) ("Any person who suffers injury or damages as a result of a violation of [the Georgia Fair Business Practices Act], ... may bring an action individually, but not in a representative capacity.").

Hawaii:

Haw. Rev. Stat. § 477E-4(b) ("[A credit] applicant may proceed only in an individual capacity and not as a representative of a class [under the Hawaii Fair Credit Extension Act of 1975].").

Idaho:

Idaho Code § 28-45-201(1) ("If a creditor has violated any provision of [the Idaho Credit Code or related laws] the debtor has a cause of action to recover actual damages and also a right in an action other than a class action, to recover from the person violating this act a penalty in an amount determined by the court not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000).").

Iowa:

Iowa Code § 537.5108(2) ("With respect to a consumer credit transaction, or a transaction which would have been a consumer credit

transaction if a finance charge was made or the obligation was payable in installments, if the court as a matter of law finds in an action other than a class action, that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, the court may grant an injunction and award the consumer any actual damages the consumer sustained.");

Iowa Code § 537.5201(1) ("The consumer ... has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover from the person violating [certain provisions of the Iowa Consumer Credit Code] a penalty in an amount determined by the court, but not less than one hundred dollars nor more than one thousand dollars.");

Iowa Code § 537.5201(3) ("[T]he consumer may recover from the creditor or the person liable, in an action other than a class action, the excess charge or refund and a penalty in an amount determined by the court not less than one hundred dollars or more than one thousand dollars.");

Iowa Code § 537.5203(1) ("[A] creditor who, in violation of the provisions of the Truth in Lending Act ..., fails to disclose information to a person entitled to the information under this chapter is liable to that person, in other than a class action, in an amount equal to the sum of the following: a. Twice the amount of the finance charge in connection with the

transaction, but the liability pursuant to this paragraph shall be not less than one hundred dollars or more than one thousand dollars.").

Kansas:

Kan. Stat. § 16a-5-201(1) ("[T]he consumer has a cause of action [under the Kansas Uniform Consumer Credit Code] to recover actual damages and in addition a right in an action other than a class action to recover from the person violating such provisions of this act a penalty in an amount determined by the court not less than $100 nor more than $1,000.");

Kan. Stat. § 50-634(b) ("A consumer who is aggrieved by a violation of [the Kansas Consumer Protection Act] may recover, but not in a class action, damages or a civil penalty ..., whichever is greater.").

Louisiana:

La. Rev. Stat. § 51:1409(A) ("Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by [the Louisiana Unfair Trade Practices and Consumer Protection Law], may bring an action individually but not in a representative capacity to recover actual damages.");

La. Rev. Stat. § 10:9-625(c)(1) (for claims involving secured transactions, a plaintiff "may recover actual damages individually

but not in a representative capacity in a class action");

La. Rev. Stat. § 51:1562(A) ("Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of fraud, dishonesty or the violation of the provisions of [a Louisiana statute involving dance studio lessons] may bring an action individually but not in a representative capacity to recover actual damages.").

Michigan:

Mich. Comp. L. § 445.1611(1) ("Class actions shall not be permitted under [the Michigan Mortgage Lending Act].").

Minnesota:

Minn. Stat. § 47.59(14)(a) ("[T]he borrower or purchaser under a credit sale contract may recover from the financial institution actual damages and, in an action other than a class action, a penalty in an amount determined by the court but not less than $100 nor more than $1,000.");

Minn. Stat. § 325F.694(7)(e) ("No class action shall be brought under this section" regarding false or misleading e-mail messages);

Minn. Stat. § 325G.44 ("A person injured by a violation of section 325G.42 may recover actual damages in an action other than a class action.");

Minn. Stat. § 325M.07 ("No class action shall be brought under this chapter [of a state statute governing internet privacy].");

Minn. Stat. § 334.17 ("[N]o class action shall be maintained" for "recovery of interest or finance charges paid.").

Mississippi:

Miss. Code § 41-67-28(3)(b) ("Nothing in [the Mississippi Individual On-Site Wastewater Disposal System Law] shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.");

Miss. Code § 75-24-15(4) ("Nothing in this chapter [governing unfair methods of competition and unfair trade practices] shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.").

Montana:

Mont. Code § 30-14-133(1) ("A consumer who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by [the Montana Unfair Trade Practices and Consumer Protection Act] may bring an individual but not a class action ... to recover actual damages or $500, whichever is greater.").

New Hampshire:

N.H. Rev. Stat. § 3590-H:4 ("No person may being a class action under this chapter [of the state statute governing computer spyware].").

New Jersey:

N.J. Stat § 46:10B-29(2) ("[A]ny borrower who asserts any defense, claim or counterclaim pursuant to [a provision of the New Jersey Home Ownership Security Act] may do so only in an individual capacity and may not assert that defense, claim or counterclaim in a class action.").

North Carolina:

N.C. Gen. Stat. § 75C-5 ("Class actions are not available under [the North Carolina Motion Picture Fair Competition Act].").

Oklahoma:

Okla. Stat. tit. 15, § 1023(A) ("[A]ny action which is brought against a defendant [under the Oklahoma Y2K Protection Act] shall ... [b]e brought only as an individual action and not as a class action.");

Okla. Stat. tit. 36, § 6595 ("No cause of action brought pursuant to [the Oklahoma Managed Health Care Reform and Accountability Act] shall be certified as a class action.").

Pennsylvania:

21 Penn. Stat. § 721-6(d)(3) ("Any action to enforce the provisions of [the Pennsylvania Mortgage Satisfaction Act], including any action to recover amounts due under this

section, shall be brought and maintained in the individual names and shall be prosecuted by persons entitled to recover under the terms hereof and not in a representative capacity.");

73 Penn. Stat. § 2208(d) ("Only an individual action may be brought under this act and no class action shall be permitted under [the Pennsylvania Plain Language Consumer Contract Act].").

South Carolina:

S.C. Code § 37-5-108(2) ("With respect to a consumer credit transaction, ... the consumer has a cause of action to recover actual damages and, in an action other than a class action, a right to recover from the person violating this section a penalty in the amount determined by the court of not less than one hundred dollars nor more than one thousand dollars.");

S.C. Code § 37-5-202(1) ("If a creditor has violated any provisions of [the South Carolina Consumer Protection Code], the consumer has a cause of action to recover actual damages and also a right in an action other than a class action, to recover from the person violating this title a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.");

S.C. Code § 37-10-105(A) ("If a creditor violates [the loan provisions of the South Carolina Consumer Protection Code], the

debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter.");

S.C. Code § 37-23-50(A) ("If a lender, or party charged with a violation, when making a high-cost home loan violates the [high-cost home loan provisions of the South Carolina Consumer Protection Code], the borrower has a right in action, other than a class action, to recover from the lender or party charged with the violation actual damages and also a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars for each loan transaction. No borrower may bring a class action for a violation of this article.");

S.C. Code § 37-23-70(F) ("The making of a consumer home loan that violates this section is a violation of the provisions of [the South Carolina Consumer Protection Code] and the borrower has a right in action, other than a class action, to recover from the lender or party charged with the violation actual damages and also a penalty in an amount determined by the court of not less than one thousand five hundred dollars and

not more than seven thousand five hundred dollars for each transaction. No borrower may bring a class action for a violation of this article.");

S.C. Code § 39-5-140(a) ("Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by [the South Carolina Unfair Trade Practices Act] may bring an action individually, but not in a representative capacity, to recover actual damages.");

S.C. Code § 40-39-160(1) ("If a pawnbroker violates [the South Carolina Pawnbroker Act], the pledgor has a cause of action to recover from the pawnbroker actual damages and the right in an action other than a class action to recover from the person violating these provisions a penalty in an amount to be determined by the court of not less than one hundred nor more than one thousand dollars.").

Tennessee:

Tenn. Code § 47-18-109(a)(1) ("Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages."); *see*

also Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 308-10 (Tenn. 2008) (interpreting this provision to preclude class actions);

Tenn. Code § 56-47-108 ("An action maintained under this subsection [of the Tennessee Workers' Compensation Fraud Act] ... may neither be certified as a class action nor be made part of a class action.");

Tenn. Code § 56-53-107(a)(2) ("An action maintained under [the Tennessee Insurance Act] may neither be certified as a class action nor be made part of a class action.").

Texas:

Tex. Bus. & Com. Code § 35.43(m) ("A court may not certify an action brought under this section [of Texas consumer law governing rebates] as a class action.");

Tex. Bus. & Com. Code § 321.109 ("A court may not certify an action brought under this section [of Texas law regulating e-mail] as a class action.");

Tex. Bus. & Com. Code § 502.002(f) ("A court may not certify an action brought under this section [of Texas law governing credit card receipts] as a class action.").

Utah:

Utah Code § 13-37-203(3) ("A person may not bring a class action under this chapter [of the Utah Notice of Intent to Sell Nonpublic Personal Information Act].");

Utah Code § 13-40-302(2) ("A person may not bring a class action under this chapter [of the Utah Spyware Control Act].");

Utah Code § 70C-7-106(6) ("No class action may be brought under this section [of the Utah Credit Code] except for injunctive or declaratory relief.").

REPLY BRIEF

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Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner

September 2009

BOTH 52E 8LR

RULE 29.6 STATEMENT

Petitioner Shady Grove Orthopedic Associates, P.A., has no corporate parent, and no publicly held company owns ten percent or more of its stock.

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SUMMARY OF ARGUMENT

As Allstate observes, the parties mainly agree about the fundamental principles of *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that govern this case. Allstate Br. 11. But in this area of law, perhaps more than most, agreement on first principles often yields disagreement on outcomes. In his response to Professor John Hart Ely's influential article *The Irrepressible Myth of Erie*,[1] for example, Professor Abram Chayes remarked that while he had "no quarrel" with Professor Ely's "overall analytic framework," he took "exactly the opposite" view from Ely about its application to particular cases. *The Bead Game*, 87 Harv. L. Rev. 741, 741 (1974).

In this case, as in many, the argument turns on the parties' competing characterizations of rules as procedural or substantive. Allstate's contention that CPLR 901(b) is substantive and does not conflict with Federal Rule of Civil Procedure 23 rests substantially on its description of section 901(b) as a rule making a "particular cause of action" "categorically ineligible" for class treatment. Allstate Br. 2. Allstate argues that section 901(b) and Rule 23 do not conflict because Rule 23 does not address the "eligibility" of "particular causes of action" for class treatment, and that limits on whether "particular causes of action" are amenable to class treatment create substantive rights that trump the federal rules in any event. Allstate Br. 17-18, 21.

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[1] 87 Harv. L. Rev. 693.

Allstate's argument is wrong on its own terms. Section 901(b) does not address "particular causes of action" or, as Allstate elsewhere says, "particular state-law claims." Allstate Br. 3. The rule prohibits New York courts from certifying classes in cases seeking certain *forms of relief* (statutory penalties or minimum recoveries), regardless of whether the claims arise under New York law, federal law, or the laws of other states.

Section 901(b) thus addresses precisely the same issue as Rule 23: Whether claims for various forms of relief may be pursued through class actions. Section 901(b), moreover, addresses that issue in a way that conflicts with Rule 23. Under Rule 23, any claim that satisfies the rule's criteria is eligible for class certification (unless some other *federal* law overrides the rule). But under section 901(b), some forms of relief eligible for class certification under Rule 23 may not be pursued on a class basis.

Given the conflict, the principles of *Hanna v. Plumer*, grounded in the Rules Enabling Act and the supremacy of federal law, require federal courts to apply Rule 23 unless doing so would alter substantive rights. Section 901(b) does not purport to create substantive rights, but only to regulate procedure—including the procedure New York courts follow in cases involving federal law, where the state lacks power to define substantive rights. Allstate's effort to analogize CPLR 901(b) to statutes limiting plaintiffs' recoveries overlooks that that is not what section 901(b) does. Allstate's own alternative description of CPLR 901(b) as a limit on the claims that can be pursued "in a single lawsuit" (Allstate Br. 25) demonstrates the flaw in its argument. The scope of a

"single lawsuit," unlike a cap on liability, is a matter of procedure, not substance. Allstate's argument that the rule was adopted for substantive reasons fails because the reasons it adduces—reflecting legislative balancing of fairness to defendants against the need to vindicate plaintiffs' rights—are the same *procedural* considerations underlying Rule 23 itself.

Even leaving aside the conflict with Rule 23, *Erie* does not require federal courts to apply CPLR 901(b) because it is not a substantive rule, for much the same reasons that it creates no substantive rights under *Hanna* and the Rules Enabling Act. Allstate's invocation of "fairness" and "forum-shopping" as reasons to label section 901(b) substantive is unpersuasive. A choice of forum based on preference for federal procedures—in particular, Rule 23's federal class-action standards—is not only proper, but consistent with the federal policy favoring application of federal class-action standards in cases falling within the original diversity jurisdiction created by the Class Action Fairness Act's amendments to 28 U.S.C. § 1332. Applying that policy to benefit plaintiffs as well as defendants is not unfair. Indeed, applying CAFA one-sidedly to support application of federal procedural standards only when they benefit defendants would belie the Act's very name.

ARGUMENT

I. Allstate's Description of CPLR 901(b), Which Permeates Its Argument, Is Erroneous.

Allstate repeatedly characterizes CPLR 901(b) as a statute making a "particular cause of action" or "particular state-law claims" "categorically ineligible" for class certification. *See, e.g.*, Allstate Br. 2, 3, 8, 12. That characterization, which underlies much of Allstate's argument, is fundamentally wrong.

First, section 901(b) is not limited to any "particular" cause (or causes) of action. It applies to *any* action seeking a certain form of relief (a penalty or minimum recovery) under any statute, state or federal. It is not a part of the law creating any specific right of action, but appears in a general procedural rule that defines, for all actions in New York courts, when classes "may" (section 901(a)) or "may not" (section 901(b)) be certified.

Second, section 901(b) does not render any substantive rights of action categorically ineligible for class treatment. New York courts have held that CPLR 901(b) permits class actions under causes of action created by statutes imposing penalties or minimum recoveries if the class does not seek that relief. *See Cox v. Microsoft Corp.*, 778 N.Y.S.2d 147 (App. Div. 2004). The statute addresses the procedures through which a type of relief may be sought in New York courts, not whether claims based on specific substantive laws are outside the bounds of class certification under CPLR 901.

Third, CPLR 901(b) is not limited to state-law claims, much less claims under *New York* statutes.

The Civil Practice Law and Rules, according to CPLR 101, apply in all "civil judicial proceedings in all courts of the state and before all judges."[2] CPLR 901 as a whole, of which 901(b) is only a part, applies to all class actions in New York state courts regardless of the substantive law on which they are based. Thus, New York courts apply section 901(a) to certification decisions in actions invoking federal statutory and constitutional claims.[3] On its face, section 901(b) applies to any claim for penalties under "a statute," with no indication that the term is reserved for New York statutes rather than federal statutes or those of other states. It would be an odd reading of the law to imply a limitation on section 901(b) that is not found in section 901(a) or the CPLR generally.

Allstate says the provision must apply only to claims based on New York law because of "the background presumption ... that the substantive reach of a State's law is limited to matters over which the State has a legitimate sovereign interest." Allstate Br. 36. That contention is circular: It assumes the conclusion that the provision *is* substantive. The argument also overlooks the obvious rejoinder that a state *may* apply nondiscriminatory procedural laws to matters in its courts arising under any substantive law. Thus, state courts regularly apply their class action rules to cases governed by substantive

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[2] *See Ling Ling Yung v. County of Nassau*, 571 N.E.2d 669 (N.Y. 1991) (CPLR 101 requires all New York state courts to apply the CPLR absent contrary statutory law).

[3] *See, e.g., Flushing Nat'l Bank v. Mun. Assistance Corp.*, 393 N.Y.S.2d 873 (S. Ct. 1977) (applying CPLR 901(a) to action raising federal constitutional claims).

law of other states. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The absence of any limitation in section 901(b) to New York statutes, combined with CPLR 101's admonition that the Civil Practice Law and Rules apply to all civil judicial proceedings in New York courts, thus indicates that the rule is *not* one of substantive New York law.[4]

It is, therefore, not surprising that Allstate cannot cite any New York case law limiting CPLR 901(b) to claims under New York statutes. Indeed, Allstate does not contest that every New York decision addressing the application of section 901(b) to federal statutory claims has either permitted or disallowed class actions depending on whether the relief sought was a penalty within the meaning of CPLR 901(b) and, if so, whether the federal statute expressly authorized class relief. Allstate quibbles with how much significance can be drawn from those rulings, but it offers *no* New York authority declining to apply 901(b) to a claim for relief under a federal statute (or a law of another state).

Allstate contends that the New York courts' application of section 901(b) to federal Telephone Consumer Protection Act (TCPA) claims in the leading case of *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (App. Div. 2005),

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[4] Allstate suggests that the questions presented in the petition for certiorari concede that section 901(b) applies only to state-law claims. Allstate Br. 37 n.7. The question Allstate cites refers to whether section 901(b) applies to *state-law claims in federal courts*, because that is the issue here. The question implies nothing about whether section 901(b) applies to federal claims in state courts.

rested solely on the TCPA's "unusual" features. Allstate Br. 37-38. The TCPA is indeed unusual, but whatever else may be said about TCPA claims, they are governed by substantive federal law. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 n.8 (2d Cir. 2006). *Rudgayzer*'s conclusion that section 901(b) applied to TCPA claims thus was not, and could not have been, based on the view that state substantive law applied. Rather, *Rudgayzer* applied section 901(b) because it was a local "form of practice" or "procedure." 799 N.Y.S.2d at 799-800. The court went on to hold that the application of this "local for[m] of practice" did not defeat the federal right of action under the doctrine of *Felder v. Casey*, 487 U.S. 131 (1988), because Congress anticipated TCPA actions would be subject to state procedural rules when it provided for state-court jurisdiction over them. 799 N.Y.S.2d at 800. But the reason the court applied section 901(b) to begin with was that it was a procedural law applicable to federal as well as state claims in the New York courts.

II. *Hanna v. Plumer* Requires Application of Federal Rule of Civil Procedure 23, Not CPLR 901(b).

Allstate's argument that *Hanna* does not foreclose application of CPLR 901(b) boils down to two propositions: Section 901(b) and Rule 23 do not conflict, and even if they do, section 901(b) creates substantive rights that trump Rule 23. Both propositions are incorrect.

A. CPLR 901(b) and Rule 23 Are Incompatible.

Allstate's contention that Rule 23 and CPLR 901(b) do not conflict rests on its invented distinction between the "*criteria* for class certification" (the sole subject, Allstate contends, of Rule 23) and the "antecedent" question of "the *eligibility* of a particular cause of action for class certification" (Allstate's characterization of CPLR 901(b)'s concern). Allstate Br. 18 (emphasis in original).

Allstate's semantic distinction has no basis in relevant case law, the language of Rule 23 and CPLR 901(b), or reality. For starters, CPLR 901(b) does not address the eligibility of particular "causes of action" for class certification; it concerns the eligibility for certification of actions seeking a broadly defined *form of relief*. That is exactly the ground Rule 23 covers: It sets forth the "prerequisites a plaintiff must satisfy to be *eligible* for a class action treatment." *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 561 (E.D. Mich. 2009) (emphasis added).[5]

Rule 23(b)'s subparts specifically determine the eligibility for certification of actions seeking various forms of relief. As the Fifth Circuit has put it, "[t]he different types of class actions [under Rule 23(b)] are categorized according to the nature or effect of the relief being sought." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). A case is eligible

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[5] *See also Garcia v. Johanns*, 444 F.3d 625, 633 n.10 (D.C. Cir. 2006) (referring to "the heavy lifting of showing eligibility for class certification" under Rule 23) (quoting *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004)).

for certification under one of the two subdivisions of Rule 23(b)(1) if the relief sought would effectively preclude plaintiffs in other individual actions from obtaining relief or threaten to impose inconsistent obligations on the defendant; an action is eligible for certification under Rule 23(b)(2) if it seeks predominantly injunctive relief;[6] and Rule 23(b)(3) makes "all other cases," including damages actions, potentially eligible for certification if they meet that subsection's more demanding requirements of predominance and superiority. *Allison*, 151 F.3d at 412.

Even if the issue addressed by CPLR 901(b) were whether "particular causes of action" are "eligible" for class treatment, Allstate is wrong in saying Rule 23 does not address that "antecedent" question. As this Court held in *Califano v. Yamasaki*, 442 U.S. 682 (1979), Rule 23 provides categorically (to use Allstate's term) that "class relief is appropriate in civil actions brought in federal court" unless *Congress* says otherwise. *Id.* at 700.[7] *Califano* underscored its conclusion by citing Rule 1's sweeping pronouncement that "the Rules 'govern the procedure in the United States district court in all cases of a civil nature.'" 442 U.S. at 700.

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[6] *See, e.g., Allison*, 151 F.3d at 428 (a civil rights action seeking injunctive relief is the "archetype of a case eligible for (b)(2) certification"); *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1187 (9th Cir. 2007) (addressing whether an action seeking backpay as well as injunctive relief is "eligible for (b)(2) certification"), *reh'g en banc ordered*, 556 F.3d 919 (2009).

[7] This case is thus unlike *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), where, as construed by this Court, the federal rule at issue did not address the point covered by state law, compliance with statutes of limitations.

To be sure, *Califano* also recognized that Congress can exempt particular actions from Rule 23 by expressing "its intent to depart from the usual course of trying 'all cases of a civil nature' under the Rules established for that purpose." *Id.* Allstate leaps to the conclusion that if *Congress* can exempt an action from Rule 23, then so can a state legislature (and hence, according to Allstate, such a state law does not conflict with Rule 23).

Allstate overlooks the small matter of the Supremacy Clause. The Federal Rules of Civil Procedure, promulgated under authority delegated in the Rules Enabling Act, 28 U.S.C. § 2072, have the force of federal law and prevail over state law under the Supremacy Clause. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.4 (1988); *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995). A state legislature thus has no power to direct a federal court to depart from the requirements of federal rules.

The matter is entirely different if *Congress* makes some category of claims or type of relief ineligible for class treatment. Such legislation is an exercise of Congress's "undoubted power to regulate the practice and procedure of federal courts," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941), which it may exercise either directly or, as in the Rules Enabling Act, by delegation. *Id.* When Congress exercises its power directly, its legislation prevails over rules promulgated by the courts. *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959).

Congress's ability to override Rule 23, moreover, does not depend on the supposition that prohibiting class actions for certain cases would establish "sub-

stantive" rights that cannot be altered by rule under the Rules Enabling Act. Congressional legislation even on purely procedural matters overrides rules promulgated by the courts. *See id.*[8] Thus, an assertion that Congress has exempted a category of cases from class treatment raises only an question of statutory construction: Does the statute require a departure from the default rule that all cases meeting Rule 23 standards are eligible for class treatment? Accordingly, this Court meant exactly what it said in *Califano* when it stated that "Congress" may exempt cases from the application of Rule 23. That principle cannot extend to state legislatures that lack authority to override federal law.

Allstate's citation of cases holding that particular federal statutes preclude class actions thus does nothing to advance its claim that Rule 23 does not address the "eligibility" of actions for class certification. Indeed, Allstate's argument is self-defeating: It underscores that unless Congress acts to regulate federal judicial procedure by limiting the availability of class actions, any action in federal court is potentially eligible for class treatment under Rule 23. *Califano*, 442 U.S. at 700.

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[8] The Rules Enabling Act provides an important exception to the principle that statutes override procedural rules: Promulgation of a federal rule renders *existing* laws that conflict with the rule "of no further force or effect." 28 U.S.C. § 2072(b). That does not disable Congress from later overriding the rule entirely or as applied to particular types of cases. "'[O]ne legislature,' Chief Justice Marshall wrote, 'cannot abridge the powers of a succeeding legislature.'" *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (Scalia, J., concurring) (quoting *Fletcher v. Peck*, 10 U.S. 87, 135 (1810)).

Allstate's argument also fails to distinguish *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), and *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22. Indeed, under Allstate's theory that state "categorical eligibility" rules do not conflict with federal procedural standards, both cases would have come out differently. In *Burlington*, for example, the federal rule providing for discretionary awards of damages and single or double costs in frivolous appeals did not explicitly address whether, as the state law at issue provided, unsuccessful appeals of damages awards were categorically *eligible* for a different type of penalty (10% of the damages award). Nor did the federal change-of-venue law in *Ricoh* address the arguably "antecedent" question whether contractual choice-of-venue provisions were, as state law provided, categorically *ineligible* for enforcement. Nonetheless, the Court found that the state laws in both cases conflicted with the generally applicable federal standards. The Court's decisions repudiated exactly the theory Allstate now advances—that state laws may provide "categorical" rules displacing generally applicable, discretionary federal standards. *Ricoh*, 487 U.S. at 29; *see also Burlington*, 480 U.S. at 7.

Here, the conflict is *more* pronounced than in *Burlington* and *Ricoh*. The federal and state rules cover precisely the same ground, determining whether class actions seeking various forms of relief may be certified. In *Burlington* and *Ricoh*, the federal standards addressed the points covered by state law much less directly. Indeed, the dissent in *Ricoh* argued strongly that while federal law might control the issue of how much weight a *valid* forum selection clause should be given in the change-of-venue calcu-

lus, it did not address the preliminary question whether the clause was valid. *See Ricoh*, 487 U.S. at 35 (Scalia, J., dissenting). Here, there is not even arguably a similar scope for operation of state law, because federal law controls the same issue that the state law addresses: whether classes seeking various forms of relief may, or may not, be certified.

Allstate's reliance on the Seventh Circuit's decision in *S.A. Healy Co.*, 60 F.3d 305, also fails to support its position. There, the question was whether a state law penalizing a defendant if a judgment exceeds a plaintiff's pretrial settlement demand conflicts with Federal Rule of Civil Procedure 68, which penalizes a plaintiff when the judgment is less than a defendant's pretrial offer of judgment. The court held there was no conflict because "the part of the state's offer-of-settlement statute involved in this case governs offers by plaintiffs, while Rule 68 is limited to offers by defendants." *Id.* at 310. Thus, the court said that "enforcing the Wisconsin rule on plaintiffs' demands" would not "tread on the toes of Rule 68," but it observed that "[t]he situation would be different if the case involved defendants' offers of settlement, because then we would have a state rule and a federal rule covering the identical issue." *Id.* at 311. That is the situation here. The federal and state rules cover the identical issue: certification of classes seeking various forms of relief.

More pertinent than *Healy* is the Seventh Circuit's subsequent decision in *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (1997), in which the court considered whether a class action in federal court was barred by a Wisconsin statute providing that class actions under that state's Consumer Act may not be

brought unless the plaintiff gives 30 days' advance notice to the defendant. The court held that the state rule conflicted with Rule 23 because Rule 23 governs class action procedure and "contains no [such] notice requirement." *Id.* at 346. So, too, here, Rule 23 not only contains no categorical limit on the eligibility of particular forms of relief for class treatment, but affirmatively provides that actions meeting its terms are eligible for class certification.

B. CPLR 901(b) Is a Procedural Rule That Creates No Substantive Rights.

Allstate's argument that application of Rule 23 rather than CPLR 901(b) would impair substantive rights fares no better. Allstate's arguments founder on the basic point that CPLR 901(b), like Rule 23 itself, addresses an intrinsically procedural matter—whether claims can be pursued through the class action mechanism.

Allstate concedes that Rule 23 is a facially valid exercise of this Court's power under the Rules Enabling Act to "prescribe general rules of practice and procedure ... for cases in the United States district courts." 28 U.S.C. § 2072(a); *see* Allstate Br. 21-22. Thus, Allstate acknowledges that the subject matter of Rule 23 (whether claims may be pursued through a class action) is procedural. Allstate correctly points out that the facial validity of a rule does not mean that the rule can be applied in particular cases to abridge a substantive right, *see* Allstate Br. 22-23, but it fails to appreciate that its concession that Rule 23 is procedural means that a state rule addressing the same subject—whether cases can proceed as class actions—is similarly procedural, and does not

establish "substantive rights" within the meaning of 28 U.S.C. § 2072(b).[9]

Allstate falls back on its mantra that CPLR 901(b) makes particular state-law causes of action categorically ineligible for class treatment and is substantive because it limits the underlying state-created rights. Again, Allstate's argument rests on a characterization of CPLR 901(b) that, as demonstrated above, cannot be squared with its structure, language, or application by the New York courts.[10] To argue that a rule that, like CPLR 901(b), is not limited to actions based on the laws of the enacting state nonetheless creates "substantive rights" amounts to asserting that New York has the power, through a statute defining the circumstances in

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[9] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1995), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which Allstate cites for the proposition that the application of Rule 23 is limited by the need to avoid abridging substantive rights, illustrate the circumstances where such abridgment might occur. In both cases, the rights at issue included the interest of absent class members in recovering damages for personal injuries and the accompanying due process right not to be bound by a judgment that extinguished that interest without notice, opportunity to be heard, or adequate representation by the named class members, whose interests conflicted with those of the absent members. *Amchem*'s and *Ortiz*'s recognition that constitutional due process rights inform the application of Rule 23 does not imply that state rules of procedure prohibiting class certification create substantive rights that limit Rule 23.

[10] CPLR 901(b) is also quite unlike the state statutes listed in Allstate's Appendix B, as those statutes apply to *particular* substantive claims under the laws of the enacting states, and they are part of the state statutes that create those particular substantive rights, not of generally applicable procedural statutes such as the CPLR.

which classes may be certified in its courts, to determine parties' substantive rights *under the laws of other jurisdictions*. That cannot be the law. A rule that attaches procedural conditions to forms of relief provided by statutes from any and all jurisdictions, state and federal, does not define substantive rights. Even one of Allstate's favored authorities, the vacated opinion in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 241 F.R.D. 77 (D. Me. 2007), *vacated*, 522 F.3d 6 (1st Cir. 2008), made precisely this point, holding that an Alabama law that precluded class actions not only under Alabama consumer protection laws but also under laws of other states was, for that reason, procedural and hence inapplicable in a federal diversity action. *Id.* at 84 n.10.

Allstate's effort to equate CPLR 901(b) with laws imposing caps on damages in class actions brought to enforce particular state and federal statutes also fails to establish that it creates substantive rights. Allstate's citation of *federal* statutes creating damages limits for class actions is irrelevant for reasons already discussed: Such statutes create no *Hanna* (or *Erie*) issue. They control federal claims in federal court not because they are "substantive," but because laws enacted by Congress, whether procedural, substantive, or both, control federal-question cases in federal courts.

State-law class-action damages caps also differ from CPLR 901(b) for *Hanna* purposes in two critical respects. First, unlike CPLR 901(b), which addresses the same subject Rule 23 comprehensively governs (amenability of cases to class treatment), damages caps concern an issue Rule 23 does not directly address: The quantum of recovery a certified class may

be awarded. Thus, such laws arguably do not conflict with Rule 23 and create no *Hanna* issue. Second, a damages cap does not define procedures, but the extent of a defendant's liability, and for that reason may be fairly characterized as "substantive." *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428-29 (1996); *id.* at 464 (Scalia, J., dissenting).[11]

Allstate contends that CPLR 901(b) is functionally equivalent to a damages cap because it limits the amount of liability that can be imposed on a defendant "in a single lawsuit." Allstate Br. 32. Like Allstate's description of CPLR 901(b) as a prohibition on certifying classes asserting "particular causes of action," *see supra* at 4-6, Allstate's assertion that CPLR 901(b) limits the liability that can be imposed "in a single lawsuit" does not accurately characterize the rule. Section 901(b) places *no* limit on the number of claims for statutory penalties that a single plaintiff may join in a "single lawsuit" or on the amount that may be awarded on those claims.[12] Nor does it prevent multiple plaintiffs from joining statu-

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[11] In *Gasperini*, members of the Court differed on whether a state law was analogous enough to a damages cap to merit characterization as "substantive." The majority reasoned that the state rule established a substantive standard requiring that jury awards be set aside if excessive (and defining excessiveness), *see id.* at 437 n.22, even though the rule "contain[ed] a procedural instruction," *id.* at 429—that is, the instruction that the court determine whether the award was excessive. CPLR 901(b) encompasses no similar substantive standard limiting the amount of a defendant's liability, but only limits the procedures through which state courts impose liability.

[12] *See, e.g.*, *Gottlieb*, 436 F.3d 336-37 (asserting diversity jurisdiction over individual action seeking $500,000 in statutory damages for 1,000 separate violations of the TCPA).

tory penalty claims in a "single lawsuit" if permitted by applicable joinder rules.

More importantly, rules governing whether claims must, or may, be brought in one action or in multiple actions are quintessentially procedural. The question of what claims and parties may or must be combined in one lawsuit is the subject of virtually all of Title IV of the Federal Rules of Civil Procedure and a fistful of individual rules, including Rules 18, 19, 20, 21, 22, 23, 23.1, 23.2, and 24 (plus, in Title III, Rules 13 and 14). Federal courts regularly apply those rules in diversity as well as federal-question actions. If the Court adopted Allstate's novel suggestion—that rules about the scope of a "single lawsuit" generate "substantive rights" under *Hanna* and the Rules Enabling Act—all those rules would have to give way to contrary rules or practices of the forum states' courts in diversity cases.

For example, West Virginia Trial Court Rules 26.01-26.12 provide for consolidation of tort actions involving multiple plaintiffs and defendants in "mass litigation" proceedings under circumstances where the Federal Rules of Civil Procedure would allow neither joinder nor class certification. *See, e.g., In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005). If, as Allstate argues, rules establishing what claims may be brought in a single lawsuit create substantive rights, then the Federal Rules could not be applied to prevent such mass litigation in diversity actions, and the West Virginia Trial Court Rules would come to govern mass tort litigation in the federal courts in

West Virginia, and possibly other federal courts in cases governed by West Virginia substantive law.[13]

Finally, Allstate contends that CPLR 901(b) creates "substantive rights" because it reflects substantive policy—namely, protecting defendants against liability. Allstate Br. 24-27. Once again, Allstate overplays its hand in describing section 901(b)'s purpose. Allstate relies on the New York Court of Appeals' description of arguments made by some lobbyists for the provision, who, not surprisingly, favored it because they believed it would reduce their clients' exposure to large damages awards. *See* Allstate Br. 25 (citing *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 211 (2007)). The New York court's own assessment of section 901(b)'s purpose reflected the views not of lobbyists but of the bill's sponsor, who did not focus on protecting defendants against liability, and instead emphasized the supposed lack of a need for class actions where statutory penalties were available to motivate individual plaintiffs to file suit. *See Sperry*, 8 N.Y.3d at 211.[14]

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[13] Allstate might answer that rules *preventing* multiple claims in a single lawsuit establish substantive rights, but not rules *expanding* the scope of a single lawsuit. But substantive rights are not a one-way street, or a one-way ratchet. A state statute repealing a damages cap, or state decisional law establishing the *absence* of a cap on damages for a particular type of action, is as "substantive" as a damages cap. Thus, if limits on the number of claims in a single lawsuit were treated as analogous to a cap on damages, so, too, a rule that placed *no* limit on the number of claims that could be joined would have to be treated the same as a rule that damages are *not* capped.

[14] Allstate cites *Sperry*'s statement that the provision reflected a "*compromise* among competing interests." Allstate Br.

(*Footnote continued*)

Even assuming, however, that the New York legislature's addition of section 901(b) when it enacted CPLR 901 was motivated by a balancing of the perceived need for class actions against concerns about fairness to defendants who might face significant liability in class actions seeking statutory penalties or minimum recoveries, that does not mean the provision creates substantive rights (or that application of the contrary federal rule would abridge or modify substantive rights). Rule 23 itself, which Allstate concedes is procedural, reflects a similar balancing of interests. For example, as Allstate acknowledges, Rule 23(f)'s provision for permissive appeal of certification decisions reflects (among other things) solicitude for defendants for whom class certification may impose a choice between settlement and "ruinous liability." Allstate Br. 29 (quoting 1988 Adv. Comm. Notes to Fed. R. Civ. P. 23). Similarly, in applying Rule 23(b)(3)'s class-certification standards, federal courts have in some cases weighed the potential consequences of class certification for defendants in considering whether a class action is "superior" to other means of adjudication of a dispute. *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

Even by Allstate's account, therefore, CPLR 901(b) reflects only New York's weighing of the same concerns of fair and efficient judicial process that are balanced differently in Rule 23. The balancing of

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26 (quoting 8 N.Y.3d at 211) (emphasis added by Allstate). That is true of most legislation. It says nothing about whether the legislation creates substantive rights.

such considerations, Allstate agrees, is the hallmark of a procedural rule. Allstate Br. 23. Section 901(b), no less than Rule 23 itself, is thus a procedural rule. As such, it creates no "substantive rights" that application of a different procedural rule—Rule 23—could abridge, enlarge, or modify.

III. *Erie* Does Not Require Application of CPLR 901(b) in Federal Diversity Cases.

A. CPLR 901(b) Is Procedural, Not Substantive.

Even leaving the Rules Enabling Act aside, the parties agree that CPLR 901(b) applies in federal diversity actions only if it is "substantive" under the *Erie* doctrine. Allstate characterizes our argument that section 901(b) is not substantive under *Erie* as "halfhearted" based on its count of the number of pages our opening brief devoted to that issue ("only" 17). *See* Allstate Br. 39. The less lengthy discussion of *Erie*, however, flows from the fact—reflected in Allstate's own brief—that many of the same considerations that determine whether CPLR 901(b) creates "substantive rights" under *Hanna*'s Rules Enabling Act analysis also bear strongly on whether the rule is substantive under *Erie*.

As to that question, Allstate does not contest that CPLR 901(b) falls outside the heartland of substantive rules under *Erie*—that is, rules that directly affect primary conduct by determining whether one person is liable to another and, if so, to what extent. *See, e.g.*, *Erie*, 304 U.S. at 70 (holding state common law applicable to whether a railroad owed a duty of

care to a trespasser).[15] To be sure, as Allstate points out, *Erie* has not always been strictly limited to such rules. Nonetheless, that section 901(b) is not such a rule weighs against characterizing it as substantive.

Allstate relies principally on this Court's decision in *Gasperini* to support its contention that section 901(b) is substantive under *Erie*. But *Gasperini* involved a rule that controlled the extent of a defendant's liability under a state-law right of action. As construed by the *Gasperini* majority, the rule reflected a substantive standard: A jury verdict is excessive if it "deviates materially from what would be reasonable compensation" under applicable state substantive law. *See Gasperini*, 518 U.S. at 423 (quoting N.Y. CPLR § 5501(c)). In other words, the rule provided a "standard of excessiveness," *id.* at 437 n. 22, and its procedural implications (that trial and appellate courts must set aside jury verdicts that did not comply with that standard) flowed from the substantive standard. *See id.* at 429 ("§ 5501(c) contains a procedural instruction, ... but the State's purpose is manifestly substantive.").

CPLR 901(b) neither contains nor implies any similar substantive limit on the amount of liability for state-created claims. It permits any quantum of liability to be imposed on defendants, but provides only that if the liability sought is for statutory penalties or minimum recoveries—under state or federal law—that liability must be imposed through individ-

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[15] See also the cases discussed in our opening brief at pp. 45-48.

ual actions (or actions involving individually joined plaintiffs), not class actions.

B. "Fairness" and "Forum-Shopping" Do Not Require Categorizing CPLR 901(b) as Substantive.

Beyond its misplaced reliance on *Gasperini*, Allstate invokes two of the policy concerns this Court has invoked in *Erie* cases: fairness and forum-shopping. As to fairness, Allstate argues that it would be unfair to allow a class action in federal court on a state-law claim that could not be certified in a New York state court.

But a federal court's use of procedures different from those used by a state court—even procedures that may affect the outcome—is not by itself unfair. Such differences inhere in a system that grants different court systems jurisdiction over the same cases. Indeed, it is no more unfair that a federal court might entertain a state-law class action that a state court would not certify under CPLR 901(b) than that a state court might refuse to certify a federal-law class action under CPLR 901(b) that a federal court would certify. As long as federal courts "respect the definition of state-created rights and obligations by the state courts," *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958), the most critical fairness concern of *Erie* is satisfied.

Moreover, the "unfairness" Allstate complains of—that the certification of a class could depend on the choice of a federal forum—could also occur even under Allstate's theory that CPLR 901(b) is "substantive" under *Erie*. If, for example, Shady Grove had brought suit on its New York law claim in a fed-

eral court in Illinois (Allstate's principal place of business) or Maryland (Shady Grove's state of citizenship), the court, under Allstate's theory that the "eligibility" of such a case for class treatment is a substantive issue, would have to follow the forum state's choice-of-law rules in determining whether to apply CPLR 901(b). *See Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). State choice-of-law rules need not follow *Erie* principles.[16] Thus, the forum state's choice-of-law rules could require application of its own class-action rules together with New York's substantive requirement that insurers pay interest on late-paid claims. In that situation, even under Allstate's view of *Erie*, the plaintiff's choice of forum would determine whether the same state-law claim could be pursued on a class basis.

As for forum-shopping, Allstate does not take issue with two important propositions. First, the policy against forum-shopping that informs this Court's *Erie* jurisprudence is not absolute. Indeed, the whole point of diversity jurisdiction (and removal jurisdiction) is to allow plaintiffs and defendants a choice of a federal forum based on legitimate reasons they may have for preferring it. Those may include a preference for life-tenured judges, for Seventh Amend-

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[16] For example, because statutes of limitations are "substantive" under *Erie*, state limitations laws apply in federal diversity cases. But state courts often apply their own statutes of limitations even to causes of action as to which another state's law will supply the substantive rules of decision. *See, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (considering application of claim preclusion to situation where same claim was barred by one state's statute of limitations but allowed by another's).

ment jury rights, for the location of the courthouse—or for the Federal Rules of Civil Procedure. *Hanna*, 380 U.S. at 475 (Harlan, J., concurring). It is *unfair* forum-shopping that is the principal concern of *Erie*. *Id.* at 467-68 (majority opinion).

Second, Allstate does not contest that the judicially created policy against forum-shopping expressed in *Erie* is subject to congressional modification. Indeed, Congress often authorizes forum-shopping.[17] Nor does Allstate deny that in the Class Action Fairness Act, Congress created a choice of a federal forum for state-law class actions (as long as the required minimal diversity, class size, and amount in controversy are present) precisely because Congress preferred Rule 23's *federal* class-action procedures. *See* Pet. Br. 49-53. As one scholar has put it, "CAFA's policy is to enable jurisdictional manipulation in search of different ('procedural') law, or at least of courts that have different attitudes toward aggregation." Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 Colum. L. Rev. 1924, 1952 (2006). In light of the congressional policy expressed in CAFA, the prospect of forum-shopping on the basis of preferences for federal class-action rules hardly provides a reason for classifying state rules on the subject as "substantive" and requiring federal courts in diversity actions to apply them under *Erie*.

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[17] *E.g.*, 28 U.S.C. § 1346(a)(2) (choice of Court of Federal Claims or district court); 26 U.S.C. § 7422(e) (choice of Tax Court, Court of Federal Claims, or district court); 28 U.S.C. §§1441-1453 (removal).

Allstate offers two answers to this point, both insufficient. First, Allstate repeats that "categorical" class-action rules are inherently substantive, and thus different in kind for *Erie* purposes from other class-action standards. Allstate Br. 47. But the issue here is whether a policy against forum-shopping should be invoked as a reason for labeling CPLR 901(b) substantive under *Erie*. Allstate's argument side-steps the inquiry by assuming the conclusion that the rule is substantive. Without that assumption, forum-shopping to avoid a "categorical" rule is no worse, or better, than forum-shopping to avoid any other state-court class-action standard. Especially in light of Congress's preference for application of federal class-action standards in cases where CAFA confers diversity jurisdiction, CPLR 901(b)'s assertedly "categorical" nature provides no more basis for labeling it substantive than any other state rule that would prohibit (or allow) class actions in circumstances where the federal rules would otherwise produce the opposite result.

Second, Allstate sees "irony" in Shady Grove's reliance on CAFA because CAFA was intended to suppress "abusive class actions." Allstate Br. 47. That an argument may be ironic, however, does not make it wrong. CAFA's supporters may have been *motivated* by a desire to rein in class actions, but that does not mean the resulting legislation always operates against plaintiffs. The statute on its face provides plaintiffs as well as defendants a choice of forum by creating original as well as removal jurisdiction over minimally diverse class actions. And contrary to Allstate's suggestion (for which it cites *no* support), nothing in CAFA "both assumes and presupposes

that a plaintiff could bring a particular class action in state court." Allstate Br. 47. Rather, by defining a class action to include "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure," 28 U.S.C. § 1332(d)(1)(B), and providing for original jurisdiction over any such action meeting diversity, class size, and amount-in-controversy requirements, the statute provides that the primary determinant of whether a case may proceed as a class in federal court is federal procedural law. That CAFA may in some circumstances benefit plaintiffs as well as defendants is no reason to shrink from its clear language, or to apply *Erie*'s forum-shopping concerns in a manner contrary to the congressional mandate that federal standards govern whether a class action may be maintained in a CAFA diversity case.

C. Accepting Allstate's *Erie* Arguments Would Impair Uniformity of Federal Procedural Law.

Finally, Allstate attempts to minimize the adverse consequences of holding that New York's prohibition on class actions in CPLR 901(b) is "substantive" law applicable in federal courts under *Erie*. Contrary to Allstate's suggestion, the holding Allstate advocates—that state-law rules about whether claims may be aggregated are "substantive" or create "substantive rights"—could not logically be confined to "categorical rules," nor to state-law rules that *prevent* aggregation as opposed to those that promote it. The result would be that in any diversity case where a state rule on class actions, or, for that matter, joinder of claims or parties, provided a dif-

ferent result than did the Federal Rules of Civil Procedure, a substantial, litigable issue would arise.[18]

Allstate asserts confidently that *Hanna* would resolve most such disputes in favor of the Federal Rules of Civil Procedure, and thus that a ruling in its favor would not threaten to displace uniform application of federal procedural standards. Allstate Br. 52 & n.10. But given Allstate's narrow view of what constitutes a conflict between state and federal rules, and its correspondingly broad view of what "rights" created by state rules are "substantive," that is small comfort. After all, to return to our starting point, Allstate sees no "conflict" between a federal rule that allows class certification and a state rule that denies it, and its arguments imply that any rule that limits (or expands) the number of claims that may be resolved in a "single lawsuit" creates substantive rights. If that were the law, uniform application of the Federal Rules of Civil Procedure in diversity actions would be seriously threatened.

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[18] Allstate suggests that state-law limitations on class actions often would not apply in federal courts because the "absence of law" is not law for *Erie* purposes. Allstate Br. 51 n.9. Allstate cites no authority for that proposition, which is surely not correct. The "absence" of a right of action under applicable state law is, for example, binding on a federal court sitting in diversity. Moreover, Allstate's "absence of law" theory is *not* the basis on which the courts in the cases Allstate cites held Mississippi's class-action prohibition inapplicable in federal court. They based their holdings on the notion that Mississippi's prohibition was not substantive, a theory fundamentally incompatible with Allstate's position. *See, e.g., Ayers v. Thompson*, 358 F.3d 356, 377 (5th Cir. 2004); *New Motor Vehicles*, 241 F.R.D. at 83.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorneys for Petitioner

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AMICUS CURIAE BRIEF

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No. 08-1008

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IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE PARTNERSHIP FOR NEW YORK CITY, INC., THE BUSINESS COUNCIL OF NEW YORK STATE, INC., NYTORTREFORMNOW.ORG, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

BRAD HOYLMAN
THE PARTNERSHIP FOR
NEW YORK CITY, INC.
One Battery Park Plaza
5th Floor
New York, NY 10004
(212) 493-7400

DOUGLAS W. DUNHAM
Counsel of Record
ELLEN P. QUACKENBOS
Four Times Square
New York, NY 10036
(212) 735-3000

Attorneys for Amici Curiae

(Additional Counsel List on Inside Cover)

HEATHER C. BRICCETTI
THE BUSINESS COUNCIL
OF NEW YORK STATE, INC.
The Schuler Building
152 Washington Avenue
Albany, NY 12210
(518) 465-7511

MARK C. KRISS
NYTORTREFORMNOW.ORG
Capitol Station
P.O. Box 7277
Albany, NY 12224
(518) 527-1148

ALLAN J. STEIN
KENNETH A. STOLLER
AMERICAN INSURANCE
ASSOCIATION
2101 L Street, NW
Suite 400
Washington, DC 20037
(202) 828-7100

ANN W. SPRAGENS
SEAN MCMURROUGH
PROPERTY CASUALTY
INSURERS ASSOCIATION
OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 297-7800

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

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INTEREST OF *AMICI CURIAE*[1]

Amici include New York and national nonprofit and business organizations and trade associations.

Amicus curiae The Partnership for New York City, Inc. ("Partnership"), is a nonprofit organization comprised of business leaders from the city's top corporate, investment, and entrepreneurial firms. The Partnership works closely with the government, labor, and the nonprofit sector to maintain New York City's position as a global center of commerce, culture and innovation. The Partnership focuses on research, policy formulation, and issue advocacy at the city, state and federal levels and submits *amicus curiae* briefs in federal and state courts on issues of concern to the city and its economic environment.

Amicus curiae The Business Council of New York State, Inc., is a leading business organization in New York State, representing the interests of large and small businesses throughout the State. Its primary function is to serve as an advocate for employers in the political and policy-making arena, working for a healthier business climate, economic growth, and jobs. One of its predecessor organizations, the Empire State Chamber of Commerce, was involved in the legislative process that resulted in the enactment of the statutory provision at issue in this case, section 901(b) of the New York Civil Practice Law and Rules ("C.P.L.R.").

Amicus curiae NYTortReformNow.org is a broad based coalition of New York business leaders, professionals, local government leaders and

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

consumers who are committed to bringing about meaningful reform to New York State's tort laws and legal system.

Amicus curiae the American Insurance Association ("AIA") is a national trade association representing major property and casualty insurance companies that collectively underwrote more than $124 billion in direct property and casualty premiums in 2007. AIA members, domiciled in most states (including New York) and transacting business nationwide, range in size from small and regional insurers to the largest insurers with global operations.

Amicus curiae the Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled and transact business in all 50 states and the District of Columbia and Puerto Rico. PCI member companies include all types of insurers, including national insurance companies, midsize regional writers, insurers doing business in a single state and specialty companies.

Amicus curiae the Chamber of Commerce of the United Sates of America is the world's largest federation of business companies and associations, representing an underlying membership of more than three million business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business, including an *amicus* brief in *Sperry v. Crompton Corp.* 863 N.E.2d 1012 (N.Y. 2007), in which the New York Court of Appeals addressed N.Y. C.P.L.R. § 901(b), the statute at issue in this case.

This case presents a question of great importance

regarding the power of New York and other States to control the extent of statutorily-created civil penalties by barring their recovery through class action proceedings. The issue of the States' power to control and moderate the extent of penalties imposed under their statutes is a matter of great concern to businesses in New York and across the country, as businesses are generally the target of class action lawsuits. Accordingly, *amici* have a profound interest in the legal and policy issues presented by this case.

The New York State Legislature enacted section 901(b) of the C.P.L.R. to preclude class recovery of statutory penalties, recognizing that when each member of a class is allowed to recover a statutory minimum or penalty, the result may be an "annihilating punishment" for businesses that are class action defendants, with deleterious consequences to the State's economic well-being. *See* N.Y. C.P.L.R. § 901(b) cmt. C901:11 (McKinney 2006) (practice commentary by Professor Vincent C. Alexander) (citation omitted). Petitioner, which seeks statutory penalties under a New York insurance statute on behalf of a purported class of New York policyholders, asserts that it should be able to avoid New York's legislative bar on the class recovery of such penalties by bringing its class action claim in federal court, rather than state court.

Numerous states have enacted legislation restricting the availability of class actions for particular types of claims and remedies. *See* Appendix B to Brief for Respondent. Mississippi's consumer protection act, for example, does not permit plaintiffs to pursue class actions under that act – a bar that has been held by the Mississippi federal district court to apply in federal court as well as state court. *See Cole v. Chevron U.S.A., Inc.*, 554 F. Supp. 2d 655, 668-69 (S.D. Miss. 2007); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 230

F.R.D. 61, 68 (D. Mass. 2005) (excluding consumers from Alabama, Alaska, Georgia, Kentucky, Louisiana, Mississippi, and Montana from class because the consumer protection statutes of those states did not allow class actions). Provisions such as section 901(b) of the New York C.P.L.R. and other state statutes barring class actions in specific categories of statutory claims reflect substantive policy choices as to the appropriate level of enforcement, punishment and deterrence. Such provisions also reflect a State's policy choices as to the appropriate extent to which to permit individual plaintiffs to act as private attorneys general in the enforcement of state statutes.

Amici respectfully submit that this Court should affirm the decision of the Second Circuit Court of Appeals, upholding the application in federal court of New York's statutory prohibition on class action lawsuits seeking penalties and minimum recoveries under New York statutes. Section 901(b) balances the interests of consumers, individuals, businesses and the State of New York in deterrence and avoiding over-deterrence. The striking of such a balance with regard to the statutory penalties it enacts is the proper prerogative of the New York State Legislature. The federal courts should not overturn that balance by making class action procedures available for plaintiffs seeking New York statutory penalties, where a class action would be unavailable under section 901(b) in the New York state courts.

SUMMARY OF ARGUMENT

The determination as to what penalties are appropriate for what conduct is a matter of substantive law that is of significant concern to each State and is unquestionably an appropriate field for State legislation. In making such determinations, numerous States have decided that certain statutory

penalties should not be recoverable in a class action. *Amici* respectfully submit that such legislative enactments barring class action recovery of statutory penalties are substantive provisions of law and embody substantive policy choices that not only affect litigants, but have important broader social and economic purposes and consequences. Such substantive provisions and policy choices should be respected by the federal courts and should not be overridden under the aegis of Federal Rule of Civil Procedure 23.

Section 901(b) of the New York C.P.L.R., at issue in this case, provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." Section 901(b) was designed to prevent the "annihilating punishment" that may result when each member of a class is allowed to recover a statutory penalty or minimum. N.Y. C.P.L.R. 901(b) cmt. C901.11 (McKinney 2006) (citation omitted).

Petitioner here contends that it should be allowed to bring a class action claim for statutory penalties under a New York insurance statute. Petitioner has brought its class action in federal court to avoid the bar of section 901(b), arguing that New York's prohibition on class recovery of statutory penalties should not apply in federal court. If accepted, that argument would lead to a fundamental disparity in outcomes between the state and federal courts and would severely undermine the substantive policies that the New York State Legislature attempted to further in enacting section 901(b).

Legislative enactments governing the statutory penalties that may be imposed on a defendant, even

if the method for limiting penalties is to bar class action recovery of them, do not conflict with Rule 23's procedures for determining whether a particular lawsuit can be fairly and efficiently tried as a class action. Rule 23 does not address in any way whether certain categories of claims may be legislatively barred in class actions. Rule 23 does not mandate that class action procedures be available for all state law claims for statutory penalties.

Petitioner seeks to subject Respondent to penalties far in excess of the penalties that would be recoverable in a New York state court, by utilizing federal class action procedures. Permitting class actions in federal courts to recover statutory penalties where the state law that created the cause of action has limited the right of recovery to individual actions would subject defendants to a level of punishment exceeding that intended or permitted by state law. Such a result impermissibly modifies substantive rights in contravention of the Rules Enabling Act, 28 U.S.C. § 2072(b).

Moreover, contrary to Petitioner's contentions, nothing in the language or purposes of the federal Class Action Fairness Act supports Petitioner's assertion that it is entitled to bring a class action claim to recover New York statutory penalties. Indeed, the legislative history of CAFA makes clear that its primary purpose was to address the problem of the over-readiness of some state courts to certify multi-state and national class actions. CAFA was not intended to override the substantive laws of the States and was not intended to further the use of federal class actions as private attorneys general actions where such actions are not available under state common or statutory law.

For these reasons, as set forth more fully below, *amici* respectfully urge that the Court affirm the determination of the Court of Appeals that class

actions to recover New York statutory penalties are barred in federal court as they are in the New York state courts, in the absence of express authorization by the New York State Legislature.

ARGUMENT

I. STATE LEGISLATIVE BARS ON CLASS RECOVERY OF STATUTORY PENALTIES ARE SUBSTANTIVE PROVISIONS THAT SHOULD APPLY IN FEDERAL COURT

A. N.Y. C.P.L.R. § 901(b) Was Enacted as a Substantive Limit on the Recovery of Statutory Penalties

The legislative history of section 901(b) amply documents the substantive policy goals that prompted its enactment by the New York State Legislature. Section 901(b) was passed into law in 1975 when New York revised its prior, extremely restrictive class action rule. Before the enactment of the new rule, New York law in practice confined class actions to cases involving "the closely associated relationships growing out of trust, partnership, or joint venture and ownership of corporate stock." *Hall v. Coburn Corp. of Am.*, 259 N.E.2d 720, 722 (N.Y. 1970); *see also Soc'y Milion Athena, Inc. v. Nat'l Bank of Greece*, 22 N.E.2d 374, 377 (N.Y. 1939). Under the old rule, there was no possibility of class action suits to recover statutory penalties or to pursue statutory causes of action in New York state courts. *See Hall*, 259 N.E.2d at 721 (rejecting consumer class action).

New York's new class action rules (N.Y. C.P.L.R. §§ 901-909) by and large followed the model furnished by Federal Rule of Civil Procedure 23. *See* Memorandum from the State Consumer Protection Board to Counsel to the Governor, at 2 (May 29,

1975). Section 901(b), however, has no counterpart in the Federal Rule. It was added to section 901 to prevent the "excessively harsh results" that would occur if the many statutory penalties contained in New York law, which had been calibrated to individual lawsuits, suddenly were made recoverable in large class actions. *See* Legislation Report No. 15 of Banking Law Committee, Business Law Committee, and Committee on Civil Practice Law & Rules of the N.Y. State Bar Ass'n, Bill Jacket, L. 1975, ch. 207, at 2 (hereinafter "Report No. 15").

The language of section 901(b) was suggested in Report No. 15, which stated:

> This section [section 901] should contain a separate subdivision (b) reading as follows:
>
> > b. Unless a statute creating or imposing a penalty, forfeiture or minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, forfeiture or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Report No. 15 at 2. This language (with omission of the reference to forfeitures) was ultimately included in the text of section 901 as enacted. *See* N.Y. C.P.L.R. § 901(b).

In explaining the need for limits on the recovery of statutory penalties, Report No. 15 pointed out that New York had many statutory penalties that had been enacted in amounts sufficient to encourage individual suits, not in anticipation that they would be recovered in class actions:

> New York statutory law contains many

> "penalty" and similar provisions establishing arbitrary measures of liability for noncompliance which, although appropriate for individual actions, would lead to excessively harsh results in large class actions. The amounts of those penalties were established at levels sufficient to provide incentives for individual suits and it would be a gross distortion of their purpose to permit their recovery in class suits.

Report No. 15 at 2. [2]

An earlier Report of the Banking Law Committee on the proposed revision of New York's class action rules described the "unfair and harsh results" of allowing recovery of "severe statutory penalties unrelated to actual damages" in class actions. *See* Legislation Report No. 1 of Banking Law Committee of Banking, Corp. and Business Law Section of N.Y. State Bar Ass'n, Bill Jacket, L. 1975, ch. 207, at 3. This Report emphasized that companies and businesses were subject to the same statutory penalties for a trivial or technical error in compliance with a statutory provision as for a more substantial failure to comply. *Id.* at 2. The Report stressed the often complex and technical nature of consumer legislation affecting banks, credit companies and retailers, and the difficulties in compliance given that the consumer "laws and regulations are subject to varying opinions, and

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[2] *See also* Sponsor Memorandum of Assemblyman Stanley Fink, Bill Jacket, L. 1975, ch. 207 ("The bill, however, precludes a class action based on a statute creating or imposing a penalty or minimum measure of recovery unless the specific statute allows for a class action. These penalties or 'minimum damages' are provided as a means of encouraging suits where the amounts involved might otherwise be too small. Where a class action is brought, this additional encouragement is not necessary.").

attorneys who specialize in these fields do not always agree on matters of interpretation." *Id.* The Report also emphasized the "special problems relating to multiplicity of error" in similar transactions with large numbers of consumers, such that allowing statutory penalties in class actions could result in "ruinous liability" for defendants, and the potential constitutional concerns of the imposition of unbounded penalties unrelated to actual damages. *Id.* at 1-3.

The New York State Legislature was also urged to adopt section 901(b) by the Empire State Chamber of Commerce,[3] which submitted a Memorandum arguing that the bill as then drafted would "harm taxpayers and our social and political institutions" and that the recovery of penalties in class actions should be prohibited. *See* Memorandum in Opposition of Empire State Chamber of Commerce, at 1, 3, Feb. 14, 1975, Bill Jacket, L. 1975, ch. 207. The Memorandum stressed that "Penalties and class actions simply do not mix," citing the example of a case in which "the combination [of a claim for penalties and a class action] caused a potential liability of $130,000,000 although the actual damages to individual plaintiffs were zero." *Id.* at 3. The Memorandum stated:

> The purpose of penalty provisions *in individual actions* envisioned in State and Federal law is to encourage wronged individuals and their attorneys to pursue their claims by creating a sufficient amount in controversy to ensure economic incentive. Statutory penalties and minimum recoveries which are necessary in *individual* actions are *not necessary in class actions*, where the

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[3] As noted above, the Empire State Chamber of Commerce was a predecessor organization of the Business Council of New York State, Inc., one of the *amici* submitting this brief.

> aggregate damage claims are large and sufficient, in and of themselves, to support litigation.

Id. (emphasis added). The Empire State Chamber of Commerce also pointed out the deleterious economic consequences of class action liability for statutory violations, including the vast amounts of money that would be expended by businesses and other institutions in defending such suits, and the resulting increase in costs of goods and services. *Id.* at 2.

In summarizing the legislative background of section 901(b), the New York Court of Appeals explained that various groups that had commented on the proposed legislation – including the committees of the New York State Bar Association through Reports Nos. 1 and 15 and the Empire State Chamber of Commerce –

> feared that recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved. They also argued that there was no need to permit class actions in order to encourage litigation by aggregating damages when statutory penalties and minimum measures of recovery provided an aggrieved party with a sufficient economic incentive to pursue a claim. Responding to these concerns, the Legislature amended the legislation to include a new subdivision – C.P.L.R. 901(b) . . . .

Sperry v. Crompton Corp., 863 N.E.2d 1012, 1015 (N.Y. 2007).

Thus, Petitioner is wrong in claiming that the decision by the New York Court of Appeals in *Sperry*

does not contain "any reference to a desire on the part of the state (as opposed to some of those who lobbied for the legislation) to limit the deterrent effect of statutory penalties, to shield defendants from liability, or to place a cap on recoveries." Pet. Br. at 40. The New York Court of Appeals made clear in *Sperry* that the New York State Legislature was "[r]esponding" to the twin concerns of avoiding excessive penalties and ensuring an appropriate level of private enforcement of the substantive goals of the statutes involved. *Sperry*, 863 N.E.2d at 1015. In any case, the Legislature's determination that class actions should not be available "where individual plaintiffs were afforded sufficient economic encouragement to institute actions [for statutory penalties]," *id.* at 1017, is clearly inseparable from the Legislature's determination as to an appropriate level of deterrence and as to the extent that it was in the public interest to enable individuals to act as private attorneys general in vindicating statutory purposes. Contrary to Petitioner's contentions, such concerns are not "procedural objectives." Pet. Br. at 40.

In short, the policy objective of section 901(b) was to ensure the appropriate application of statutory penalties to achieve the purposes intended by the Legislature, including the appropriate level of deterrence and punishment. The importance of such policy choices by the States was acknowledged by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Each State has "legitimate interests in punishing unlawful conduct and deterring its repetition," and "States necessarily have considerable flexibility in determining the level of [punishment] that they will allow in different classes of cases . . . ." *Gore*, 517 U.S. at 568. Accordingly, the "basic principle of federalism" requires that "each State may make its own reasoned judgment about what conduct is

permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Campbell*, 538 U.S. at 422.

Section 901(b) represents a policy judgment by the New York State Legislature as to substantive matters of deterrence and punishment and is clearly substantive law under traditional standards. As shown below, section 901(b) is also substantive law under the substantive-procedural analysis established under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and governs substantive statutory rights, which may not be abridged, enlarged or modified by the application of the Federal Rules of Civil Procedure.

B. N.Y. C.P.L.R. § 901(b) Is Substantive for Purposes of *Erie* and the Rules Enabling Act

A statute or rule is substantive for purposes of the determination whether a federal court sitting in diversity should apply state or federal law when it "significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court," *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945); *see also Hanna v. Plumer*, 380 U.S. 460, 466 (1965); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court." *Guaranty Trust*, 326 U.S. at 109. The application of the outcome-determination test is guided by "the twin aims of the *Erie* rule:

discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468.

Under the outcome-determination test, where local law that creates the cause of action qualifies it, "the federal court must follow suit," for "a different measure of the cause of action in one court than in the other" would transgress "the principle of *Erie*." *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949). Thus, in "adjudicating a state-created right," a federal court "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." *Guaranty Trust*, 326 U.S. at 108-09.

Here, like the New York C.P.L.R. provision at issue in *Gasperini*, section 901(b) effectively limits the recovery available in a single lawsuit and is substantive. In *Gasperini*, New York imposed a different standard for review of compensatory awards for excessiveness (the "deviates materially" standard) from that used in federal courts (the "shock the conscience" test). Noting that "[i]n design and operation, [the 'deviates materially' standard] influences outcomes by tightening the range of tolerable awards," *Gasperini*, 518 U.S. at 425, this Court held that "the State's objective" in imposing the "deviates materially" standard was "manifestly substantive." *Id.* at 429. As the Court stated, "[i]f federal courts . . . persist in applying the 'shock the conscience' test to damage awards on claims governed by New York law, '"substantial" variations between state and federal [money judgments]' may be expected." *Id.* at 429-30 (second alteration in original) (footnote omitted) (citation omitted).

Here, New York's objective in prohibiting recovery of statutory penalties or minimum awards in class actions absent a specific statutory authorization is to

prevent the imposition of excessive penalties. As in *Gasperini*, section 901(b) in design and operation influences outcomes and limits the range of tolerable awards. Failure by the federal courts to apply section 901(b) will clearly result in substantially different outcomes in state and federal court, with defendants in federal court potentially subjected to penalties that are hundreds or thousands of times the penalty that could be imposed in state court. That disparity would encourage forum shopping and would result in inequities between New York plaintiffs and out-of-state plaintiffs and between New York defendants and out-of-state defendants.

The fact that New York accomplishes the substantive policy goal of limiting the statutory penalties to which a defendant may be subjected through a rule that restricts the availability of the class action procedure does not render section 901(b) procedural. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 728 (1974). This Court has recognized that the fact that the "enforcement mechanism" chosen by a State to effect substantive state policy achieves its goal by restricting the availability of a court procedure or the court's jurisdiction does not itself render the rule in question procedural. *Id.* at 727-28 (citing *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)).[4]

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[4] In *Woods*, this Court "held applicable in a diversity action a Mississippi statute providing that corporations that had not qualified to do business in the state would not be permitted to sue in its courts." Ely, 87 Harv. L. Rev. at 728. As Professor Ely explains, that decision was correct whether analyzed under the Rules of Decision Act or under the Rules Enabling Act because, although "the statute's enforcement mechanism, its club, was a denial of jurisdiction, a device that may well typically be employed for procedural ends, . . . a primary reason jurisdiction was denied . . . was to encourage corporate qualification," which is "a substantive goal concerned with something other than the way litigation is to be managed." *Id.*

Section 901(b) was enacted for substantive purposes. New York has chosen to enforce civil statutory requirements and prohibitions (most of which, like New York Insurance Law section 5106 here, are applicable to insurance companies or other consumer businesses) by authorizing plaintiffs, acting as private attorneys general, to recover statutory penalties, even in the absence of actual damages. Such penalties are enforcement mechanisms intended to achieve the substantive state policies embodied in those statutes. In creating such penalties, New York is entitled to determine the appropriate level of deterrence – which does not necessarily mean "maximizing" the quantity of enforcement of its statute by private attorneys general.[5] Such penalties are provided to incentivize and reward particular individual conduct – bringing and prevailing in a lawsuit under the statute in question. Absent members of a class by definition have not engaged in the conduct sought to be encouraged and have not acted to further the State's substantive policies and goals. Application of Rule 23 to permit the award of statutory penalties to absent class members would improperly interfere with the substantive policies embodied in the enforcement mechanisms chosen by New York.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court rejected the argument that the provisions of a New Jersey statute that made a small stockholder who instituted a derivative action liable for the expenses of the corporation if he lost the lawsuit, and required the stockholder to post

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[5] *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 620 (2001) (in enacting fee-shifting statute that allowed defendants as well as plaintiffs to receive a fee award, "Congress did not intend to *maximize* the quantity of 'the enforcement of federal law by private attorneys general;'" rather, Congress "desired an *appropriate* level of enforcement . . . ." (citation omitted)).

a bond as security for those expenses were "mere rules of procedure rather than rules of substantive law." *Id.* at 555. The goal of the New Jersey statute was to discourage "strike lawsuits" and to help ensure that a plaintiff was "not putting forward a claim to capitalize personally on its harassment value." *Id.* at 552. As the Court held, the statutory imposition of liability on a losing plaintiff for the defendant's litigation expenses was a substantive provision. The fact that the statute also prescribed a procedure (posting a bond) to ensure that the liability for expenses, if incurred, would be met did not warrant treating the statute as a "mere procedural device." *Id.* at 556. In short, a state statute or rule may have procedural aspects, but if, as with section 901(b), its goals and purposes are primarily substantive, the provision or rule is substantive and should be applied in federal court.

Unless section 901(b) is applied in federal court to claims for penalties and minimum damages under New York statutes, the "character" and "result" of litigation seeking such penalties will "differ[] materially simply because a plaintiff sues in federal, as opposed to state, court." *Bonime v. Avaya, Inc.*, 547 F.3d 497, 502 (2d Cir. 2008) (quoting *Hanna v. Plumer*, 380 U.S. at 467).

II. PERMITTING CLASS ACTIONS IN FEDERAL COURT TO RECOVER STATUTORY PENALTIES SUBJECT TO N.Y. C.P.L.R. § 901(b) WOULD ABRIDGE SUBSTANTIVE RIGHTS

Petitioner argues that section 901(b) does not contravene the Rules Enabling Act's mandate that the federal rules of civil procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), because there is no right "not to face a class action." Pet. Br. at 33. Petitioner profoundly

misunderstands the right at issue. The right at issue here is the right not to be subjected in a single lawsuit to New York statutory penalties far in excess of the penalties intended or authorized by the State Legislature.

The imposition in a class action lawsuit of multiple statutory penalties unrelated to any actual damages (as Petitioner seeks here) would raise significant due process concerns, which would clearly be within the province of the federal courts to address. *See Campbell*, 538 U.S. at 416-17. New York, however, is not required to allow private enforcement of its statutes up to the outermost limits of due process. New York may protect defendants from penalties that might pass muster under due process but would be excessive as a matter of New York's substantive policy. Application of Rule 23 to override New York's policy determination would impermissibly enlarge the rights of plaintiffs and abridge the rights of defendants as established by New York law. Petitioner's contention that Rule 23 requires that the federal courts have "discretion" over such matters is directly contrary to the Rules Enabling Act.

Nor should the federal courts treat a State's mandate that recovery for a state statutory cause of action not be had in a class action merely as a factor in a federal court's discretionary determination as to whether a class should be certified. Contrary to Petitioner's contentions, such a result is not supported by this Court's decisions in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), or *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987). Both those decisions (unlike this case) involved issues directly and solely related to judicial process and procedure. In *Burlington Northern*, this Court held that an Alabama statute imposing a mandatory ten percent "affirmance penalty" on unsuccessful appellants was not applicable in federal court. This Court held that application of the

Alabama rule would improperly limit the federal courts' exercise of discretion under Federal Rule of Appellate Procedure 38. Unlike the penalty in *Burlington Northern*, which penalized conduct in litigation (*i.e.*, "frivolous appeals and appeals interposed for delay," 480 U.S. at 4), the penalties at issue in this case penalize conduct outside of litigation, namely the defendant's conduct in its insurance or commercial transactions with the plaintiff – the conduct upon which the substantive cause of action is based.

Stewart is similarly distinguishable from the present case. In *Stewart*, the Court held that 28 U.S.C. § 1404(a) governed a litigant's "request to give effect to the parties' contractual choice of venue." *Stewart*, 487 U.S. at 29. In so holding, the Court stated that "[s]ection 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized case-by-case consideration of convenience and fairness.'" *Id.* (citation omitted). Significantly, a forum-selection clause does not govern the parties' conduct in performing their contractual obligations. It governs only what occurs when a contractual dispute proceeds to litigation. Thus, unlike section 901(b), a forum-selection clause (and the state law governing its validity and enforceability) is purely procedural. It does not influence the outcome of the litigation, but only where the litigation takes place.

Neither *Stewart* nor *Burlington Northern* supports making it discretionary with the federal district courts whether to give or not give effect to the substantive law enacted by the New York Legislature barring recovery of statutory penalties in class actions. The application or non-application of section 901(b) would produce a substantial – indeed an enormous – difference not only in the penalties that can be imposed in a single litigation, but also on the penalties that will be imposed overall for a

course of conduct affecting numbers of consumers. Section 901(b) is based on the common-sense and realistic recognition that if each individual must go to court to collect a statutory penalty, the sum total of penalties will be very much smaller than the penalties that might be assessed in a class action. *Cf., e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 748 & n.26 (5th Cir. 1996) ("[A] court cannot extrapolate, from the number of potential plaintiffs, the actual number of cases that will be filed."). This Court should not disregard this reality based upon Petitioner's contention that there is no effect on substantive rights because theoretically a defendant would be subject to the same number of potential penalties even if a class were not certified.

In sum, permitting class actions to recover New York statutory penalties would result in the imposition of penalties far beyond those contemplated and intended by the New York State Legislature, with deleterious economic and social consequences to corporate and business defendants doing business in New York, to New York consumers, and to the economic and social environment of the State.

III. THE CLASS ACTION FAIRNESS ACT DOES NOT OVERRIDE SECTION 901(b)

Petitioner's invocation of the federal Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), as somehow supporting its use of a federal forum to sidestep section 901(b) is completely without merit. *See* Pet. Br. at 49-53. Congress's concern in enacting CAFA was to preclude the abuse of state court class actions in cases with interstate or national importance. *See* Pub. L. No. 109-2, § 2(a)(4), (b)(2), 119 Stat. at 5 (codified at 28 U.S.C. § 1711 note); S. Rep. No. 109-14, at 5 (2005), *reprinted in*

2005 U.S.C.C.A.N. 3, 6. CAFA was not intended to provide and does not provide a federal forum for class actions for state law claims (and especially claims for state-created penalties) where state law specifically prohibits a class action on the particular claim presented.

The legislative history of CAFA repeatedly makes clear that the principal problem that Congress sought to address was the over-readiness of some state courts to certify multi-state and national class actions. Congress found that the fact that "'federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly,'" was a "compelling rationale[] for allowing more interstate class actions to be heard by federal courts." S. Rep., No. 109-14, at 53, *reprinted in* 2005 U.S.C.C.A.N. at 50 (citation omitted) (response to Critics' Contention No. 2); *see also id.* at 22, *reprinted in* 2005 U.S.C.C.A.N. at 22 (criticizing the "'I never met a class action I didn't like' approach to class certification" prevalent in state courts in some localities); *id.*, at 11, *reprinted in* 2005 U.S.C.C.A.N. at 12 (noting as justification for expanded diversity jurisdiction over class actions the fact that some state court systems are prone to produce "'gigantic awards against out-of-state corporate defendants'") (citation omitted).

The Senate Report on CAFA also decried "the tendency of some state courts to be less than respectful of the laws of other jurisdictions, applying the law of one state to an entire nationwide controversy and thereby ignoring the distinct, varying state laws that should apply to various claims" in a multi-state or nationwide class action. *Id.* at 37, *reprinted in* 2005 U.S.C.C.A.N. at 35. The Report rejected the contentions of some critics of the proposed legislation that CAFA would "trample on the rights of states to manage their legal systems"

and that there was "no evidence that in the class action context, federal courts will intrude less on the states' rights to interpret their own laws than have state courts." *Id.* at 60-61, *reprinted in* 2005 U.S.C.C.A.N. at 56-57 (Critics' Contentions Nos. 8 and 9). The Report stated that "federal courts have consistently heeded" this Court's "admonitions," including its admonition that "'each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.'" *Id.* at 63, *reprinted in* 2005 U.S.C.C.A.N. at 58 (Response to Critics' Contention No. 9) (citation omitted).

The legislative history of CAFA emphasizes that CAFA was *not* intended to authorize or facilitate the "use [of] class actions as private attorneys general actions to deter corporate wrongdoing." *Id.* at 58, *reprinted in* 2005 U.S.C.C.A.N. at 54 (Response to Critics' Contention No. 6); *see also id.* ("Although a few courts have over the years referred to the deterrent effects of class actions, the promulgation history of the current Rule 23 of the Federal Rules of Civil Procedure reflects no intent to create a private attorney general device.").[6] To the contrary, the Senate Report on CAFA makes clear that, in the view of the Senate Judiciary Committee, the "concept of class actions serving a 'private attorney general' or other enforcement purpose is illegal." *Id.*

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[6] The Senate Report also quotes the statement of Judge Paul Niemeyer, formerly chair of the Advisory Committee on Civil Rules, in which he says "I believe that Rule 23 was never intended to be a rule to enhance enforcement of substantive claims. Such legitimization should, in my judgment, be effected by Congress, and Congress might well conclude . . . that it is too anarchical to authorize private attorneys to self-appoint themselves as enforcers of law without adequate accountability to the lawmakers or the public." Senate Rep. No. 109-14, at 59, *reprinted in* 2005 U.S.C.C.A.N. at 55 (internal quotation marks omitted; alteration in original).

at 59, *reprinted in* 2005 U.S.C.C.A.N. at 55. Thus, "[i]f the intended purpose of Rule 23 was to empower private attorneys to act as 'attorneys general,' the rule plainly bestows substantive rights not otherwise available under common or statutory law." *Id.* "Interpreted in this way," Rule 23 would "run[] afoul of the Rules Enabling Act, which forbids federal courts from adopting 'rules of practice and procedure' that may 'abridge, enlarge or modify an substantive right.'" *Id.* (footnote omitted; citation omitted).

Accordingly, by enacting CAFA, Congress did not intend to alter state law restricting the recovery of state statutory penalties in class actions and viewed such laws as substantive, not procedural. In the instant case, Plaintiff's claim for statutory penalties is based upon a New York statute setting a time-frame for an insurer's deciding to grant or deny a claim for benefits under a New York insurance policy. It is not disputed that those statutory penalties are subject to section 901(b) of the New York C.P.L.R. Contrary to Petitioner's contentions, under this Court's *Erie* and Rules Enabling Act decisions, neither CAFA nor Rule 23 may permissibly override New York's limitation on the recovery of statutory penalties in class actions.

CONCLUSION

The Court should affirm the decision of the Court of Appeals holding that section 901(b) of the New York C.P.L.R. applies in federal court to bar class certification of claims for penalties provided under New York statutes, absent specific statutory authorization of class recovery of such penalties.

Respectfully Submitted,

BRAD HOYLMAN
THE PARTNERSHIP FOR
NEW YORK CITY, INC.
One Battery Park Plaza,
5th Floor
New York, NY 10004
(212) 493-7400

DOUGLAS W. DUNHAM
Counsel of Record
ELLEN P. QUACKENBOS
Four Times Square
New York, NY 10036
(212) 735-3000

HEATHER C. BRICCETTI
THE BUSINESS
COUNCIL OF
NEW YORK STATE, INC.
The Schuler Building
152 Washington Avenue
Albany, NY 12210
(518) 465-7511

MARK C. KRISS
NYTORTREFORMNOW.ORG
Capitol Station
P.O. Box 7277
Albany, NY 12224
(518) 527-1148

ALLAN J. STEIN
KENNETH A. STOLLER
AMERICAN INSURANCE
ASSOCIATION
2101 L Street, NW
Suite 400
Washington, DC 20037
(202) 828-7100

ANN W. SPRAGENS
SEAN MCMURROUGH
PROPERTY CASUALTY
INSURERS ASSOCIATION
OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 297-7800

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

AMICUS CURIAE BRIEF

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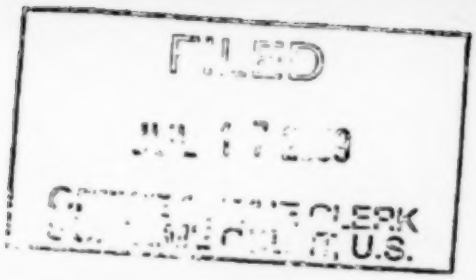

No. 08-1008

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

LESLIE A. BRUECKNER
ARTHUR H. BRYANT
MATTHEW S. MELAMED
PUBLIC JUSTICE, P.C.
555 12th Street, Ste. 1620
Oakland, CA 94607
(510) 622-8150

AMANDA FROST
Counsel of Record
4801 Massachusetts Ave., NW
Washington, D.C. 20016
(202) 274-4046

Attorneys for Amicus Curiae Public Justice

July 17, 2009

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INTEREST OF AMICUS CURIAE[1]

This brief is filed on behalf of Public Justice, P.C., a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuse. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

Public Justice regularly represents consumers and employees in class actions, and our experience is that the class action device, properly used, often represents the only meaningful way that individuals can vindicate important legal rights. Public Justice is gravely concerned that, if the lower court's decision in this case is upheld, there will be no limit to the extent to which states can eliminate class actions in diversity cases in federal courts.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

Because the factual background of this case has been thoroughly set forth in Petitioner's Opening Brief, this brief contains only a limited discussion of the underlying litigation. However, because the history of the class-action device in general, and of Federal Rule of Civil Procedure 23 in particular, is relevant to the question presented in this case – *i.e.*, whether a state legislature may prohibit federal courts from using the class-action device for state law claims – this Statement of the Case is largely devoted to a description of the history and evolution of representative litigation in federal court.

This Litigation:

In brief, this is a proposed class action seeking compensatory damages and declaratory relief for Allstate Insurance Co's. alleged disregard of a New York statute that provides for mandatory statutory penalties for violations of certain "no-fault" insurance laws. *See* N.Y. Ins. Law § 5106(a) (McKinney 2009). Jurisdiction in the district court was based on the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 14. Both the district court and the United States Court of Appeals for the Second Circuit held that no class action could be maintained in federal court due to a prohibition on class actions set forth in Section 901(b) of New York's Civil Practice Law and Rules. (The statute specifically provides that, "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery, specifically authorizes the recovery thereof in a class action, an

action to recover a penalty, or minimum measure of recovery created or imposed by statute, may not be maintained as a class action.")

In so ruling, the Second Circuit held that New York's prohibition on class actions supersedes Federal Rule of Civil Procedure 23, the procedural rule that governs class actions in federal court.

The Origins of Representative Litigation in Federal Court:

Representative litigation has always been an essential tool for managing the business of the federal courts. Representative litigation existed in English law since the very beginning of that country's legal system, and the practice was adopted by United States federal courts in the earliest days of their existence. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 3, 216-17 (1987). Since then, the federal courts have literally never been without the benefits of some variation of the class action device.

As this Court explained in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-33 (1999), representative litigation was created by courts of equity in response to the procedural problems of managing litigation involving large numbers of similarly situated persons. Because the traditional rule that all interested persons must be made parties to the suit would "at times unfairly deny recovery to the party before the court," the federal courts created exceptions to that rule "to cover situations 'where the parties are very numerous, and the court perceives that it will be al-

most impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole.'" *Id.* (quoting *West v. Randall*, 29 F. Cas. 718, 722 (No. 17,424) (C.C.D.R.I. 1820) (Story, J.)).

The centuries-old practice of enabling individuals to sue on behalf of a class was first codified in 1842, in Federal Equity Rule 48, which was succeeded by Federal Equity Rule 38 in 1912. *See* HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 1.9 at 31 (4th ed. 2002). In 1934, Congress enacted the Rules Enabling Act, which authorized the creation of uniform rules of federal practice and procedure. Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064. That process produced the Federal Rules of Civil Procedure in 1938, which established Rule 23, the modern version of which governs the use of class actions in federal court today. *See* NEWBERG ON CLASS ACTIONS § 1.9 at 32. A key component of Rule 23 is subsection (b), which defines the types of claims for which class actions are available in federal court.

The Evolution of Rule 23:

The original version of Rule 23 set out three categories of class actions: so-called "true" class actions, which concerned "joint, common, or secondary rights"; the "hybrid" category, which involved "several" rights related to "specific property"; and "spurious" actions, which encompassed "several" rights affected by a common question and for which common relief was sought. The drafters of the original Rule 23 believed that these three categories "described the

situations amenable to the class-suit device." 1966 Adv. Comm. Notes to Rule 23.

These three categories proved difficult for courts to apply, however, and the consensus became that they were unworkable. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 380-86 (1967) (hereinafter "Kaplan, *Continuing Work*"). In 1966, the drafters entirely rewrote Rule 23 in an effort to resolve the problem. Far from abandoning the idea of defining the types of claims for which class actions should be available in federal court, the drafters sought instead to clarify precisely which claims should be eligible for class treatment in federal court. As Advisory Committee Reporter Benjamin Kaplan explained, the Advisory Committee sought to lay out in "functional" terms "those recurrent life patterns which call for mass litigation through representative parties." Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969).

The drafters of revised Rule 23 described the numerous benefits of class-action litigation. First, class actions preserve judicial resources by providing a mechanism for the efficient resolution of large numbers of like claims. *See* Kaplan, *Continuing Work*, 81 HARV. L. REV. at 390. *See also* NEWBERG ON CLASS ACTIONS § 1.10 at 36. Second, the device protects defendants from incompatible judicial decisions. *See* Kaplan, *Continuing Work*, 81 HARV. L. REV. at 388 ("The party is saved by a class action from being forced into a 'conflicted' position.") Third, class actions ensure that all persons affected by a lawsuit

will have their interests represented in the litigation. *See* 1966 Adv. Comm. Notes to Rule 23. Finally, class actions provide access to justice for litigants whose claims are too small to make individual adjudication cost effective. *See* Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. at 497 (stating that the 1966 revisions were intended "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (citation omitted).

The commentary accompanying the 1966 amendments to Rule 23 describes how each category of claims for which class relief is available under Rule 23(b) serves to promote these three goals:

- Under Rule 23(b)(1)(A), class actions are permitted when individual actions might lead to inconsistent decisions establishing "incompatible standards of conduct for the party opposing the class." Without the availability of class action relief in these cases, different courts might issue rulings imposing inconsistent obligations, which would be unfair to the party subject to those rulings, and would inevitably undermine the effectiveness and le-

gitimacy of judicial decisionmaking. For that reason, the drafters concluded that the "class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class." 1966 Adv. Comm. Notes to Rule 23.

- Rule 23(b)(1)(B) provides that a class action is appropriate when individual adjudications would "as a practical matter be dispositive of the interests of the other members not party" to the actions. The commentary to the 1966 amendments explains that, in such cases, the "vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit." 1966 Adv. Comm. Notes to Rule 23. By allowing for representative litigation in such cases, the class action device ensures that absent class members' interests will be protected.

- Rule 23(b)(1)(B) also applies when individual adjudication would "substantially impair or impede" other persons' "ability to protect their interests," such as "when claims are made by numerous persons against a fund insufficient to satisfy all claims." Again, the Advisory Committee noted that a "class action by or against representative members to settle the validity of the claims as a whole," followed by "proportionate distribution of the fund," will ensure equitable distribution of a limited fund. 1966 Adv. Comm. Notes to Rule 23.

- Rule 23(b)(2) allows class actions in cases in which the party opposing the class "has acted or refused to act on grounds that apply generally to the class," and thus where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." In such cases, the Advisory Committee determined, "individual lawsuits . . . would . . . be inadequate and inefficient" due to the group nature of the rights at stake. Kaplan, *Continuing Work*, 81 HARV. L. REV. at 389.

- Finally, Rule 23(b)(3) permits class adjudication when "questions of law or fact common to class members predominate" and the class action is "superior" to other methods of adjudicating the dispute. Among the factors to be considered in certifying a class under this subdivision is the "burden that separate suits would impose on the party opposing the class, or upon the court calendars." 1966 Adv. Comm. Notes to Rule 23. The Advisory Committee explained that Rule 23(b)(3) covers "cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.*

The Rule 23(b) subdivisions thus contribute to the core mission of the Federal Rules of Civil Procedure: to facilitate "just, speedy, and inexpensive" resolution of civil actions in a manner that promotes uniformity of decisionmaking and protects against the

waste of judicial resource. *See Amchem*, 521 U.S. at 617-18 ("Class actions are a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one.") (quoting Fed. R. Civ. P. 1)). As the rulemakers realized, class actions are essential both to promote fairness to litigants and to avoid wasteful, duplicative litigation and/or litigation resulting in conflicting judicial decisions.

Notably absent from the Advisory Committee's comments is any distinction between class suits premised on state as opposed to federal law. The categories of class suits defined in Rule 23(b) turn on questions about the fairness and efficiency of the class device under various circumstances. The source of the underlying claims is irrelevant. Indeed, the drafters of the 1966 revisions expressly noted that the Federal Rules would apply in diversity cases, and that conflicting state law would necessarily give way to federal procedure. Kaplan, *Continuing Work*, 81 HARV. L. REV. at 369.

SUMMARY OF ARGUMENT

For nearly as long as they have existed, the United States federal courts have employed representative litigation to ensure the just and efficient resolution of cases before them. States cannot, through their own legislative or judicial choices, eliminate class actions in federal diversity cases, for at least four reasons.

First, the class action device is codified in Federal Rule of Civil Procedure 23, which specifies the types

of claims eligible for aggregation as a class. As this Court has previously made clear, *see Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965), a federal rule cannot be altered by state practice unless the rule violates the Rules Enabling Act or transgresses constitutional boundaries – a position that *no* party to this case has taken. Rule 23 is carefully calibrated to make class actions available in cases in which courts and litigants alike have a reason to prefer that a representative litigate the claims on behalf of a group of similarly situated claimants. Accordingly, states cannot disrupt the balance struck by Rule 23 by dictating which claims are eligible for class treatment in federal court.

Second, even if Rule 23 were not embodied in a federal rule, the class action is a longstanding procedural device whose use by the federal courts cannot be controlled by state practice. Under the principles established in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, substantive state law governs in diversity cases in federal courts, but state procedures do not. States have no authority to change – or, as in this case, eradicate – the procedural practices of the federal courts.

Third, as their long historical pedigree illustrates, class actions are an essential tool for managing the business of the federal courts. Federal courts rely on the class action device to conserve scarce judicial resources and to ensure that litigants are treated fairly. States cannot eliminate this essential characteristic of federal judicial practice, just as this Court has previously found they have no power to alter the relationship between judge and jury because of its

central role in the operation of the federal courts. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

Fourth, through the recently-enacted Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 14, Congress has made clear that class actions are to be governed by federal standards in cases qualifying for federal diversity jurisdiction. Indeed, the principal goal of that legislation was to expand federal diversity jurisdiction to ensure that Rule 23 governs in large interstate class actions, rather than leave out-of-state litigants at the mercy of idiosyncratic state practices and procedures. If state law could determine when the class action device is available in federal court, CAFA would be severely undermined.

The far-reaching consequences of Respondent's position in this case further demonstrate why Rule 23, and not state law, governs in federal courts. According to Respondent, any state, either through legislative action or judicial decision, may choose to eliminate the class action device not only in its own courts, but in every federal court sitting in diversity, without creating a conflict with Rule 23. If Respondent were correct, then federal courts could be forced to hear thousands of identical claims in separate actions, even if those claims would qualify for class treatment under Rule 23, and regardless of the obvious inefficiencies of such a procedure and the potential for it to paralyze the operation of the federal judicial system. Nor could federal courts use aggregate litigation to avoid issuing decisions establishing incompatible standards of conduct (as they can now

under Fed. R. Civ. P. 23(b)(1)(A)), thereby forcing litigants to disobey one judicial decision in order to follow another, and undermining the authority of the federal courts in the process. Finally, under Respondent's theory, states could effectively eliminate the federal courts as a forum for litigants whose state law claims are too small to enable them to pursue individual adjudications, even though Rule 23(b)(3) exists to provide access to justice for such claimants.

Moreover, if Respondent were correct that the availability of the class action device is a substantive rule governed by state law rather than a procedural rule governed by federal law, then states would be equally free to drastically *expand* the availability of class actions beyond the limits of Rule 23. Federal courts could be forced, for example, to certify class actions whenever they meet the requirements of state law, even if they fail to satisfy the prerequisites of Rule 23. For all these reasons, Rule 23 cannot be displaced by state statutes and/or judicial decisions purporting to eliminate class actions for certain categories of claims.

ARGUMENT

STATES CANNOT ELIMINATE CLASS ACTIONS IN FEDERAL DIVERSITY CASES.

I. NEW YORK RULE 901(b) CONFLICTS WITH FEDERAL RULE 23, AND THUS CANNOT LAWFULLY BE APPLIED IN FEDERAL COURT.

There is no dispute that claims such as Petitioner's here could be brought as class actions under Federal Rule of Civil Procedure 23. New York Civil Practice Law & Rules 901(b) ("N.Y. Rule 901(b)"), which bars class treatment for Petitioner's claim, directly conflicts with Rule 23 and therefore has no application in federal court. *See Hanna*, 380 U.S. at 471-72.

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny established that federal courts must follow state substantive law in diversity cases, although federal courts continue to apply federal procedural rules and practices in such litigation. *See, e.g., Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1966). However, this Court has also made clear that, when a Federal Rule of Civil Procedure is directly on point, "the question facing the court is a far cry from the typical, relatively unguided *Erie* choice." *Hanna*, 380 U.S. at 471. Rather than engage in an analysis of the state law to determine whether it is substantive or procedural, courts instead must apply the federal rule in federal court unless it finds that "the Advisory Committee, this

Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Rules Enabling Act nor constitutional restrictions." *Id.; see also Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6 (1987) ("[T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect . . . give the Rules presumptive validity under both the constitutional and statutory constraints."); *Gasperini*, 518 U.S. at 428 n.7 ("It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.").[2]

Without question, Rule 23 comports with the Rules Enabling Act and does not overstep constitutional restrictions on the power to establish procedural rules governing litigation in federal court. Respondent has never claimed otherwise. Rather, Respondent contends that "there is no conflict between [N.Y. Rule] 901 and Rule 23" because "nothing in Rule 23 either requires or forbids a federal court to certify a class action for any specific claim." Cert. Opp. at 8. Respondent apparently reads Rule 23 as doing no more than establishing the procedures governing class actions in federal court, without dictat-

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[2] The Rules Enabling Act provides that the "Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts," 28 U.S.C. § 2072(a), and states that the rules "shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b).

ing the types of claims for which the class device is available.

Although Respondent is correct that Rule 23 grants federal courts discretion as to whether to certify a class action as satisfying the requirements of Rule 23(a) and (b), Respondent is wrong to conclude that the two rules are therefore compatible. By prohibiting class treatment of an entire category of claims seeking monetary damages, N.Y. Rule 901(b) *prohibits* class actions in cases in which Federal Rule 23 *expressly allows* class actions to go forward. *See* Fed. R. Civ. P. 23(b)(3) Because N.Y. Rule 901(b) bars class actions for some of the very claims eligible for class actions under Rule 23, it is in clear conflict with that rule. *See, e.g., Burlington N. R.R.*, 480 U.S. at 7 (holding a state law rule mandating damages for unsuccessful appeals invalid because it conflicted with Federal Rule of Civil Procedure 38, which gave district courts discretion to award such damages).

As explained in the Statement of the Case, Rule 23(b) carefully defines the types of claims in which representative litigation best serves the interests of the federal courts and litigants in obtaining "just, speedy, and inexpensive" resolution of their disputes. Fed. R. Civ. P. 1. Not only did the 1966 revisions to Rule 23 set out in detail the types of claims for which the class action device should be made available, but the Advisory Committee explained the purpose of each Rule 23(b) subdivision and described how enabling representative litigation in such cases would further the Federal Rules' ultimate goal of ensuring just and efficient resolution of civil disputes. For ex-

ample, Rule 23(b)(3) – the subdivision of Rule 23 that applies to Petitioner's claim in this case – permits class actions in cases in which "questions of law or fact common to class members predominate" and the class action is "superior" to other methods of adjudication. The Advisory Committee explained that class actions are desirable in these circumstances because representative litigation "achieve[s] economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." 1966 Adv. Comm. Notes to Rule 23.

A state law barring class actions under Rule 23(b)(3) would be in direct conflict with the express intentions of the drafters to make the class action device available for such claims. N.Y. Rule 901(b) is just such a state law. Claims that are eligible for certification as a class action under Rule 23(b)(3), such as Petitioner's claim here, would be barred from proceeding as a class action were N.Y. Rule 901(b) to apply in federal court. In light of this direct conflict, and Respondent's admission that Rule 23 does not violate the Rules Enabling Act and the U.S. Constitution, N.Y. Rule 901(b) may not lawfully be applied in federal court. *See Hanna*, 380 U.S. 460.

Were it otherwise, then any state could prevent federal courts from aggregating individual claims together in a class action, rendering Rule 23(b) a nullity and eliminating the availability of class actions in diversity cases in federal courts. Although N.Y. Rule 901(b) does not bar class actions for *all* claims under New York law, the logic of Respondent's posi-

tion is that any state could choose to do just that with respect to its own laws. The results could be disastrous for the already-overloaded federal courts. For example, even if thousands of identical claims were filed in federal district courts, a state law barring class actions could force those courts to resolve each and every claim separately rather than address them together in a single action, as they may do under Rule 23. Likewise, if class actions were prohibited in federal diversity cases, district courts would inevitably issue decisions establishing incompatible standards of conduct in cases seeking injunctive relief, putting litigants in the impossible position of trying to comply with conflicting court rulings, and undermining the legitimacy of judicial decisions in the process. Finally, if Respondent were to have its way, small claimants could be stripped of their ability to bring their claims as a class, thereby barring their access to federal courts just as surely as if the state had declared their claims nonjusticiable and attempted to impose that conclusion on the federal courts.

All of these results would conflict with the overall purpose of the Federal Rules of Civil Procedure to ensure the "just, speedy and inexpensive determination" of disputes, Fed. R. Civ. P. 1, as well as the specific goals of Rule 23(b), and thus cannot be squared with the Rules Enabling Act's mandate that federal courts, together with Congress, establish uniform rules of procedure to govern litigation in federal courts.

Moreover, if the availability of the class action device were considered a question of substantive law

that could be controlled by the fifty states in diversity cases, then states could similarly control use of all of the various mechanisms for joinder and aggregation of claims in federal court. Rule 23 is closely related to the many other Rules that define when group litigation is permissible. *See* NEWBERG ON CLASS ACTIONS § 1.10 at 38 ("Rule 23 is interrelated with other rules of civil procedure relating to parties in litigation. . . ."); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 824 (5th Cir. 1967) (noting that the 1966 "revision [to Rule 23] was a coordinated one to tie more closely together the related situations of joinder, F.R. Civ. P. 19, and class actions, F.R. Civ. P. 23").

For example, Federal Rule of Civil Procedure 42 authorizes joint hearings or trials in actions "involv[ing] a common question of law or fact." Interpleader allows a party to file a case seeking to join persons with potential claims against that party to avoid exposure to double or multiple liability. Fed. R. Civ. P. 22. Various joinder rules, such as Federal Rules of Civil Procedure 14, 18, 19, 20 and 24, allow multiple claims and parties to come together in a single suit under certain conditions. If Respondent's view were correct, a state could conceivably alter or abolish all of these other mechanisms as well on the ground that none is truly "procedural." As Advisory Committee Reporter Benjamin Kaplan commented, joinder rules such as Rule 19 "operate[ ] in a field long identified with the procedure of courts," and thus he found it "hard to imagine the [Supreme] Court overthrowing" these Rules in favor of state law in diversity cases. Kaplan, *Continuing Work*, 81 HARV. L. REV. at 369.

All of these interrelated rules are permissible under the Rules Enabling Act, and they govern in federal court, because they are procedural devices for ensuring the just and efficient adjudication of disputes. States are of course free to establish their own procedural rules to govern aggregation and joinder in their own courts. State cannot, however, dictate the procedures to be followed in federal courts.

II. CLASS ACTIONS ARE A PROCEDURAL DEVICE CONSTITUTING AN ESSENTIAL CHARACTERISTIC OF THE FEDERAL JUDICIAL SYSTEM, AND THUS CANNOT BE DISPLACED BY STATE LAW.

As discussed above, because N.Y. Rule 901(b) directly conflicts with Rule 23, the state law must give way in federal court. Even if the class action device had never been codified in the Federal Rules of Civil Procedure, however, it could not be displaced by a state law. Class actions serve the important procedural goals of providing for the just and efficient resolution of large groups of similar claims. *See Amchem*, 521 U.S. at 617-18. The class device does not alter the substance of claims or the remedy permitted, but simply governs the *method* by which plaintiffs pursue their claims in federal court. Thus, state laws prohibiting class actions are conflicting procedural rules that have no place in federal court. *See, e.g., Gasperini.*, 518 U.S. at 427 ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

In addition, because the class device is an "essential characteristic" of the federal judicial system, it cannot be displaced by a state law prohibiting class actions. In *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958), this Court held that a federal policy favoring jury resolution of disputed questions of fact could not be displaced by a conflicting state law requiring a judge to make such determinations. The Court reasoned that the judge-jury relationship was an "essential characteristic" of the federal judicial system, and concluded that "'state laws cannot alter the essential character or function of a federal court,' because that function 'is not in any sense a local matter.'" *Id.* at 539 (quoting *Herron v. Southern Pacific Co*, 283 U.S. 91, 94 (1931)).

Likewise, class actions are an essential tool for managing the business of the federal courts. In fact, as explained above, the very first generation of federal judges turned to representative litigation as a means of ensuring the just and efficient resolution of disputes. *See* YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION at 216-17. Class actions' long historical pedigree is a testament to the essential role they play in conserving judicial resources, consolidating like claims, and preventing federal courts from issuing incompatible decisions. The ability to determine when and how like claims can be aggregated into a single lawsuit is just as essential to the federal judicial system as is the power to maintain the division of labor between judge and jury, and therefore cannot be altered by conflicting state law. *Byrd*, 356 U.S. at 537.

III. THE CLASS ACTION FAIRNESS ACT DEMONSTRATES CONGRESS'S INTENT THAT FEDERAL LAW CONTROL THE AVAILABILITY OF CLASS ACTIONS IN FEDERAL COURT.

The Class Action Fairness Act of 2005 expanded federal jurisdiction over class actions in diversity cases. CAFA accomplished this goal by amending the diversity jurisdiction statute, 28 U.S.C. § 1332, to provide for jurisdiction over class actions involving minimal diversity of citizenship between any class member and any defendant if the class consists of at least 100 members and the aggregate amount in controversy exceeds $5 million. It would frustrate the core purposes of CAFA if states could bar class actions in federal courts or otherwise alter their availability in diversity cases.

As the statute's legislative history makes clear, Congress intended CAFA to serve a number of purposes. First and foremost, CAFA made it easier for parties to class actions to litigate their cases in federal courts so that they could benefit from the application of federal procedural rules applied by an Article III judge. S. Rep. No. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. Congress was concerned that state judges were not dealing fairly with out-of-state parties, and that states were too willing to certify class actions in cases where federal courts would not. *Id.* at 4. Congress sought to ameliorate that problem by providing for a federal forum in which Federal Rule of Civil Procedure 23 would govern all certification decisions. *See* Stephen B. Burbank, *Aggregation on the Couch: The Strategic*

Uses of Ambiguity and Hypocrisy, 106 Colum. L. Rev. 1924, 1950 (2006) (CAFA gives litigants "access . . . to courts that have a different attitude toward aggregate litigation, and in any event access to a potentially different outcome on the certification question.").

Second, CAFA was intended to provide for more efficient resolution of like claims by enabling their consolidation into a single federal forum, thereby avoiding the waste of judicial resources that can occur when "multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." S. Rep. No. 109-14, at 23. By expanding federal jurisdiction, CAFA was designed to "create[ ] efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be consolidated in a single federal court . . . ." *Id.* at 5. Although Congress was primarily concerned about the filing of duplicative "copycat" class actions in multiple state courts, the burden on judicial resources would be even greater if states could compel each injured party to file a separate lawsuit, as N.Y. Rule 901(b) does.

If states were permitted to bar class actions in federal courts, even when those actions satisfy Rule 23(a) and (b) and the jurisdictional requirements of CAFA, then CAFA could be rendered irrelevant. No longer would litigants benefit from the application of Rule 23; indeed, there would be no point to seeking removal to federal court. Furthermore, by preventing the consolidation of like cases into a single federal court, as Congress intended, states could un-

dermine Congress's goal of reducing duplicative litigation in matters that could be treated as a single class action in a single federal court. A state could frustrate Congress's purpose not only in cases in which that state's substantive law is at issue, but also in cases involving the laws of more than one state, or in which state law claims are supplemental to those brought under federal law, since the state law component of these cases could not be resolved together with the rest of the class's claims.

Furthermore, under Respondent's theory, states could also pass laws *expanding* the categories of claims available for class treatment in federal court, which would be in directly conflict with Congress's intent to give defendants the opportunity to defend against certification according to the criteria set forth in Rule 23 by removing class actions to federal court. As discussed above, CAFA was inspired by Congress's perception that some state courts were certifying class actions too easily, making this procedural device more readily available than it would be under Rule 23. Although Congress recognized that states have the power to establish procedural rules in their own courts, it wished to give parties to interstate class actions – and in particular, defendants in such class actions – the opportunity to benefit from federal certification standards. If states could dictate the types of claims available for class treatment, then presumably state laws that expand the class action device beyond the categories listed in Rule 23 would also govern in federal court in diversity cases.[3]

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[3] Nor would these state rules necessarily have to be codified into state law. Under the principles of *Erie*, 304 U.S. 64, if

(*Footnote continued*)

Such a result would undermine the very purposes of CAFA – an outcome that Congress could not have intended and that this Court should not permit.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals affirming the district court's dismissal of the complaint should be reversed and the case should be remanded for further proceedings.

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a state Supreme Court establishes a more lenient rule for the certification of class actions in that state, then, following Respondent's logic, the federal courts would be bound to follow that state precedent.

Respectfully submitted,

AMANDA FROST
Counsel of Record
4801 Massachusetts Ave, NW
Washington, D.C. 20016
(202) 274-4046

LESLIE A. BRUECKNER
ARTHUR H. BRYANT
MATTHEW S. MELAMED
PUBLIC JUSTICE, P.C.
555 12th Street, Ste. 1620
Oakland, CA 94607
(510) 622-8150

Attorneys for Amicus Curiae
Public Justice

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